United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL 76-7306

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAMELA SCHNEIDER, PATRICK WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, On behalf of themselves and their minor children and all others similarly situated,

Plaintiffs-Appellees,

-against-

BETTI S. WHALEY, Individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, Individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, Individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellants.

B

UNITED STATES COURT OF APPEALS
FILED
JUL 9 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

On Appeal from Order of the United States District Court for the Southern District of New York

JOINT APPENDIX

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DOCKET ENTRIES

Date	NR.	PROCEEDINGS
6-21-76	1	Filed complaint and issued summons.
6-23-76	2	Filed pltfs. affdt. and OSC for prel. injunction, TRO and Class ~~Action~~ determination--ORDERED that defts. show cause on June 24, 1976 at 10a in Rm. 109 why an order should not be issued to enjoin defts. from terminating day care services, etc. declare this as a class action, ORDERED that service be made by June 22, 1976 at 11am etc. as indicated. Knapp, J.
6-23-76	3	Filed pltfs. memorandum of ~~xx~~ law in support of above motion.
6-23-76	4	Filed pltf's. supplemental memorandum of law re: HEW opinion letter.
07-02-76	5	Filed defts. notice of appeal to the U.S.C.A. for the Second Circuit from order of 7-1-76. mailed copies to Litman, Friedman, Kaufman and Pollac & Kaminsky
06-30-76	6	Filed MEMORANDUM decision and ORDER # 44690 Pltfs, parents suing on behalf of themselfs and all others similarly situated,, seek a prel. injunction staying the Agency for Child Development ("ACD") The relief granted to pltfs and its Ordered that ACD hold a group hearing or a series of group hearings, purpose of the group hearing is to afford the parents an opportunity to present their views and information... The parties are directed to submit proposed orders by 7-1-76 at 12:00 noon. The Court declines to issue a stay pending appeal. So Ordered--Cannella, J. m/n.
7-6-76	7	Filed Municipal defendants' motion for an order denying application for a preliminary injunction and dismissing the complaint pursuant to Rule 12 and 6(B) of FRCP. Motion returnable June 25, 1976, at 10:30 a.m. before Judge Cannella. (Note: Document submitted and received by chambers on June 24-76.)
7-6-76		Filed defendants' Affidavit in opposition to application for preliminary injunction and in support of cross-motion to dismiss.
7-6-76		Filed Mrmorandum of law in opposition to plaintiff's motion for a preliminary injunction and in support of defendants' cross-motion to dismiss.
7-6-76		Filed plaintiffs' reply Affidavit in support of motion for a preliminary injunction and class accion certification.
7-6-76		Filed plaintiffs' affidavit in reply to the affidavit of James Nathaniel and in support of plaintiffs' motion for a preliminary injunction and class action certification.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

BEST COPY AVAILABLE

2

ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,	769 91
Plaintiffs,	76 Civ.
- against -	Class Action
BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,	Order to Show Cause for a Preliminary Injunction, Temporary Restraining Order and Class Designation
Defendants.	

Upon reading and filing the summons and complaint dated June 21, 1976, the affidavit of RICHARD M. ASCHE, Esq., sworn to the 21st day of June, 1976, the affidavits of PAMELA SCHNEIDER, MARIE MYRTIL, JANE ROE, PETER SAVER and MABEL DEAN, sworn to the 19th day of June, 1976, and affidavit of LYNN ANN TYLER, sworn to the 21st day of June, 1976, and annexed exhibits, it is hereby:

ORDERED that defendants or their attorneys show cause before the Hon. John T. Curtin in Room 128 of the United States Courthouse, Foley Square, New York, New York on June 24, 1976 at 2 ~~A.M./~~P.M. WHY an order should not be issued pursuant to Rules 65 and 23(c) of the Federal Rules of Civil Procedure:

1. Preliminarily enjoining defendants from terminating or reducing day care services to plaintiff parents and children and the class they represent; pending compliance by defendants with the requirements od due process of law and federal and state statute and regulations pertaining to "fair hearings";

2. Declaring that this action may proceed as a class action pursuant to Rule 23(b)(2), Fed. R. Civ. P.; and

3. Granting plaintiffs such other and further relief as to this Court may seem just and proper.

It appearing that plaintiffs who are parents and children are imminently threatened with the complete loss of day care services and that such loss would cause them irreparable harm and that defendants are violating the rights of the parents and children that they service under the Social Security Act, binding regulations of HEW promulgated thereunder and the Fourteenth Amendment, it is

ORDERED that pending hearing and determination of the motion for a perliminary injunction, the defendants, their agents and attorneys and all persons in active concert with them be and are hereby:

1. Required to continue day care services to plaintiff parents and children and the class they represent during the pendency of this action, and it is further

ORDERED that service of this order, temporary restraining order and supporting papers shall be sufficient if made personally upon the Attorney General of the State of New York at the World Trade Center , New York, N. Y.. Corporation Counsel of the City of New York at the Municipal Building, New York, N. Y., on or before 11 A.M./P.M. June 22, 1976. and it is further ordered that ~~it~~ may serve a copy of this Summons & complaint upon As provided for FRCP Rule 4

Dated: New York, New York
June 21, 1976

U.S.D.J.

4

AFFIDAVIT OF RICHARD M. ASCHE

United States District Court
Southern District of New York

----------x

Pamela Schneider, et al.,

Plaintiffs,

-against- Affidavit

Betti S. Whaley, et al.,

Defendants.

----------x

State of New York)
: ss.:
County of New York)

Richard M. Asche, being duly sworn, deposes and says:

I am a member of the bar of this Court and of the firm of Pollack & Kaminsky, co-counsel with Litman, Friedman & Kaufman, attorneys for the plaintiffs herein. Plaintiffs move:

A] Pursuant to Rule 65 (a) and (b) Fed. R. Civ. P. for a temporary restraining order and preliminary injunction enjoining defendants from terminating or reducing day care services to plaintiffs and the plaintiff class without first having accorded plaintiffs a "fair hearing" as required by the United States Constitution, the United States Supreme Court, this Court, federal statutes and regulations, state statutes and regulations and the Department of Health, Education and Welfare;

B] Pursuant to Rule 23(c) Fed. R. Civ. P. declaring that this action may be maintained as a Rule 23(b)(2) class action.

Plaintiffs' motion for a temporary restraining order and a preliminary injunction should be granted because:

1] Plaintiffs are virtually certain to prevail on the merits: The Constitution of the United States, the Supreme Court of the United States, this Court, federal and state statutes and regulations and the Department of Health, Education and Welfare* all unequivocally require that any person whose day care services are denied, reduced or terminated is entitled to (a) timely and adequate written notice of such denial, reduction or termination, (b) notice of and a right to a "fair hearing" before an administrative hearing officer and (c) maintenance of day care services pending such "fair hearing." At bar, defendants have steadfastly refused and failed to provide either such notice or such "fair hearing" or such maintenance of services.

2] Plaintiffs will be irreparably harmed if a temporary restraining order and a preliminary injunction are not granted: If funding for plaintiffs' day care centers is withheld on July 1, 1976, the following will occur almost immediately: (a) working parents of children in the defunded centers will be forced to leave their jobs or abandon vocational training and education to care for their children and will be required to apply for welfare in order to subsist; (b) children will be abruptly cut off from the vital educational, social and psychological opportunities day care is intended

*As shown infra (page 7), the federal official responsible for administering the benefits here at issue and day care programs in New York City has stated (in writing) that, at bar, plaintiffs and members of the plaintiff class have "an unqualified right to a fair hearing."

to provide; (c) the centers will lose their lease and their staff; once shut down they will be unable to reopen. Such harm would obviously be irreparable.

3] The balance of equities favors plaintiffs: Contrasted with the serious and irreparable injury threatened to plaintiffs, the sole potential injury to defendants would be to prolong for a brief period funding levels currently in effect. However, defendants will have only themselves to blame for such harm. Plaintiffs requested fair hearings early in June 1976; the hearings could have been held prior to July 1. Defendants, having elected to deny plaintiffs their constitutional and statutory rights at a time when it would not have required an injunction, should not now be heard to complain of costs they will incur solely because of their own unlawful delay.

Plaintiffs' motion for class action Rule 23(b)(2) certification should also be granted. Defendants' conduct is directly applicable to and will affect the class as a whole. Injunctive relief is what is sought and is obviously the appropriate remedy. Under such circumstances, the action fits precisely within Rule 23(b)(2).

The Facts, in Brief*

Plaintiffs are parents of some 3,500 children enrolled in 64 day care centers throughout New York City. Each of these day care centers is funded under Title XX of the Social Security Act (42 U.S.C. §1397 et. seq.) (Funds are made available in the following ratio: federal, 75%; state, 12 1/2%; New York City, 12 1/2%).

The defendants are the commissioners of the New York State and City agencies charged with administering Title XX funds in New York City.

On May 26, 1976, the defendants announced at a press conference that on July 1, 1976, they intended to terminate federal funding for the day care centers at which plaintiffs' children are enrolled. As a practical matter, such "defunding" represents removal of the sole source of income for the centers and will require that they close their doors as of July 1, 1976.

For most members of the plaintiff class the closing of their day care center means the end of day care for their children. No alternative centers are available to accept these children. The process by which the defendants chose centers for defunding (which at best seems to have been a random selection process) has resulted in the defunding of several centers which

*This affidavit summarizes facts contained elsewhere in plaintiffs' motion papers.

are, in the truest sense, irreplaceable. Thus, among the centers defunded by defendants are:

--five of only seven infant care centers in Manhattan; the remaining two centers are already operating at capacity and have long waiting lists;

--one of only two centers in Brooklyn which specialize in the problems of emotionally disturbed children; the other centers, ten miles away, is enrolled over capacity with a long waiting list;

--the only day care center in Brooklyn serving Kosher food;

--the only four day care centers west of Broadway in the Bronx;

--the only day care center in a remote area of Staten Island.

The foregoing are merely examples. Suffice it to say, of the 3,054 parents contacted in a survey by plaintiffs, only 855 or less than 28% have received notices from defendants offering alternative placement.

Even where alternative placement is offered by defendants, such offer must seem a cruel joke to the plaintiffs and members of the plaintiff class. For example, plaintiff

Marie Myrtil, who is bedridden with thrombophlebitis has received an offer to send her child to a day care center which is accessible only by two bus rides and a long walk. Her present center is only a block or two from her home.

Other parents have reported to us that their English speaking children have been "transferred" by defendants to a center where only Spanish is spoken (or vice versa).

By far the most common complaints are:

1) That children who previously walked to school would now be required to spend an hour or two a day on public transportation to attend a day care center out of their neighborhood (these children are not school children, they are three, four and five years old); and

2) That the "alternative" centers are already overcrowded or would become overcrowded as a result of the transfers contemplated by defendants (one center reports that its enrollment would increase from 105 children (its legal limit) to 178, if the defendants' transfer plans are put into effect).

Plaintiffs will prevail on the merits:

In spite of the massive termination of day care services

to the plaintiff class, defendants have not even feigned compliance with the most minimal requirements of due process of law and have flaunted federal and state statutes and regulations. As shown in the accompanying memorandum of law, there is simply no room for doubt or debate that any parent threatened with the denial, reduction or termination of day care services must be accorded the following elements of due process:

1) timely and adequate notice of termination or reduction of day care services;

2) timely and adequate notice of the reasons for such termination or reduction;

3) timely and adequate notice of a right to a fair hearing prior to termination or reduction;

4) a fair hearing at which an opportunity to confront and cross-examine adverse witnesses is provided; and

5) maintenance of day care services pending the outcome of the fair hearing.

The entitlement of plaintiffs to a fair hearing is confirmed by the Department of Health, Education and Welfare, the federal agency responsible for administering Title XX funds. As appears in the annexed letter of Melvin Herman, Associate Regional Commissioner for Public Services of the Department of Health, Education and Welfare, each parent whose child attends

a day care center whose funding is scheduled to be terminated as of July 1, 1976 by the New York City Agency for Child Development "has an unqualified right to a fair hearing" if the closing of these centers results in the termination, suspension or reduction of day care services for the children of these parents.

Plaintiffs contend that the defunding of these day care centers was arbitrary and capricious. While it is not plaintiffs' intent to prove the merits of their claims on this motion--which seeks only the right to a fair hearing--the accompanying affidavits provide some insight into the method by which the Agency for Child Development has chosen these centers and its refusal to reconsider its decision when presented with irrefutable facts.

It must be remembered that the decision to close these particular day care centers was made by a single agency (indeed a single man at the agency) and has not been reviewed by any elected official. This agency has steadfastly refused (despite repeated requests) to share with plaintiffs or the public the facts which it brought to bear in determining which day care centers to close and which to leave open. The fair hearing safeguard was enacted to prevent just such a concentration of unreviewable decision-making power in the hands of one man or one agency.

Plaintiffs will suffer irreparable injury:

The accompanying affidavits of the representative

plaintiffs amply demonstrate the hardships which will ensue if day care is terminated for plaintiffs and members of the plaintiff class. Day care parents are either a) single parents who must work to support their children--these parents will be forced to quit work and accept welfare if they lose day care; b) parents who are disabled and unable to work or care for their children--many of these parents will be forced to place their children in foster homes; c) parents on welfare who are seeking employment in order to become self-supporting; d) parents enrolled in schools or other training programs; and e) parents with emotionally disturbed or handicapped children who need specialized care for their children but are unable to afford it privately.

The balance of equities favors plaintiffs:

Compared to the irreparable harm which will befall plaintiffs if their day care services are abruptly terminated, defendants will suffer only a minor and temporary pecuniary loss if they are required to maintain day care services at their present level pending a fair hearing.

Moreover, many plaintiffs demanded fair hearings earlier in the month of June. Had defendants complied with due process, a fair hearing could have been held in early June. Thus, any delay is attributable solely to the fault of defendants.

The Class Action Motion

Plaintiffs clearly comply with the requisites of a Rule 23(b)(2) class.

Rule 23(a):

1. numerosity: the class consists of 3,500 persons, clearly a sufficient number for class action treatment, particularly where the class members are predominantly poor;

2. common questions of law or facts: as shown in the acompanying memorandum of law, there are common issues relating to the interpretation of the Constitution, and federal and state statutes and regulations;

3. typicality: as appears from the accompanying affidavits of the plaintiffs, these women represent a cross-section of the day care population (group day care, limited purchase of services, infant care); by geography; and by character of recipient.

4. adequate representation: the plaintiffs are represented by two firms of attorneys experienced in federal litigation, class action litigation and civil rights litigation.

My firm, Pollack & Kaminsky, has represented parties to several class actions over the past five years. I personally have represented plaintiffs in several civil rights actions. I also represent several day care centers.

Messrs. Litman, Friedman & Kaufman are similarly experienced litigation attorneys. Jack T. Litman of that firm was formerly the Deputy Chief of the Homicide Bureau of the

Manhattan District Attorney's office.

Rule 23(b):

The basis of this action is the failure of defendants to maintain day care services in their present form for members of the plaintiff class pending a fair hearing. The legal issue thus presented is whether the law requires such a fair hearing. If it does, the class as a whole would be entitled to injunctive relief.

Conclusion

Plaintiffs' motion for a temporary restraining order, preliminary injunction and class action designation should be granted in all respects.

Richard M. Asche

Sworn to before me this
21st day of June, 1976.

NEIL D. THOMPSON
Notary Public, State of New York
No. 31-9375340
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT ANNEXED-LETTER FROM DEPARTMENT OF HEALTH EDUCATION & WELFARE

15

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION II
FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

SOCIAL AND REHABILITATION SERVICE

June 17, 1976

Richard M. Ashe, Esq.
Pollack and Kaminsky
61 Broadway
New York, New York 10006

Jack T. Litman, Esq.
Litman, Friedman, Kaufman .
120 Broadway
New York, New York 10005

Gentlemen:

This is in response to the questions you asked me, concerning the right to a fair hearing involving day care services provided under Title XX of the Social Security Act. You asked me under what circumstances parents whose children attend day care centers whose funding is scheduled to be terminated as of July 1, 1976 by the New York City Agency for Child Development have a right to a fair hearing.

My answer is as follows:

Each parent has an unqualified right to a fair hearing pursuant to 45 CFR 205.10 and 45 CFR 228.14 promulgated pursuant to 42 U.S.C. 1397, et seq if the action of the Agency for Child Development results in the discontinuance, suspension, reduction, or termination of the day care service which the family has been receiving as an eligible recipient in the Title XX program. The State agency must provide the recipient with a notice of termination at least 10 days before the action would become effective. In accordance with 45 CFR 205.10 (6)(i), services "shall not be suspended, reduced, discontinued, or terminated, (but is subject to recovery by the agency if its action is sustained) until a hearing is rendered."

Such a notice is required and such hearings must be offered when:

1) the parent has not received timely and adequate written notification from the Agency for Child Development of the availability and offer of alternative day care services; or

2) the parent has received timely and adequate written notification of the availability and offer of alternative day care services, but the alternative services are at a distance from the parent's home such as to effectively preclude the parent from utilizing such services; or

Exhibit J

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3) the parent has received timely and adequate written notification of the availability and offer of alternative day care services, but the parent alleges in good faith that such alternative services constitute a reduction in services from those currently provided.

You also asked me whether this Regional Office has communicated directly with the New York Department of Social Services, the Single State Agency responsible for the administration of the Title XX program in New York State, concerning the proper interpretation of 45 CFR 228.14 and 45 CFR 205.10. My answer is as follows:

New York State has raised certain questions about fair hearings in communications with this Regional Office and the Administrator of the Social and Rehabilitation Service. Acting Regional Commissioner Toby of the Social and Rehabilitation Service advised Acting Commissioner Toia of the New York State Department of Social Services by letter of June 2, 1976 of applicable federal policy. (A copy of that letter is attached.) No response to that letter has as yet been received.

The Department of Health, Education, and Welfare is, of course, vitally concerned that its fair hearing regulations are enforced.

Sincerely yours,

Melvin Herman
Associate Regional Commissioner
for Public Services

Attachment

BEST COPY AVAILABLE

AFFIDAVIT OF RICHARD M. ASCHE

Affidavit for Temporary Restraining Order

State of New York
County of New York ss.

Richard M. Asche, being duly sworn, deposes and says:

1. This motion is being brought on by order to show cause because the actions sought to be enjoined are scheduled to take effect on July 1, 1976, and plaintiffs cannot achieve the requested relief via the normal motion process.

2. No previous applcation has been made for the within relief.

3. On June 21, 1976, at approximately 2:00 p.m. I telephoned Joel Lewittes, Assistant Attorney General of the State of New York, and advised him of the nature of the action and of this application for a temporary restraining order. He stated that he was "not sure" whether any attorney representing the defendant Toia would appear, but he acknowledged notice of the application.

4. On June 21, 1976, at 2:00 P.M. I telephoned a Mr. Gutstein, an Assistant Corporation Counsel for the City of New York, and advised him of the nature of the action and of this application.

Richard M. Asche

Sworn to before me this 21st day of June, 1976

MARTIN I. KAMINSKY
Notary Public, State of New York
No. 30-0022320
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF MABEL DEAN

State of New York)
: ss.:
County of New York)

Mabel Dean, being duly sworn, deposes and says:

I submit this affidavit in support of plaintiffs' motion for a temporary restraining order and a preliminary injunction.

I am a member of the Leadership Committee of the Day Care Legal Action Coalition. The Day Care Legal Action Coalition was formed in the early part of June, 1976 to coordinate the legal efforts of the many parents whose children currently attend the day care centers scheduled for defunding July 1, 1976. The Leadership Committee was selected by representatives of these centers and has served as the clearing house for information from the various defunded centers and the parents of the children who attend them. The coalition currently represents some 56 day care centers and the parents of some 3,054 children. These day care centers include group day care centers, family day care centers, group purchase of service centers and limited purchase of service centers.

The leadership committee, at the request of the attorneys for the plaintiffs, have gathered information from the centers and from the parents of children enrolled at these centers. We have spoken directly with the directors of 56 of the 64 affected centers, and at our request these directors have obtained certain information from the parents of the 3,054 children enrolled in these centers. The results of our survey, insofar as they are applicable to plaintiffs' motion for a temporary restraining order and preliminary injunction are as follows:

1] To date no parent of a child enrolled at a day care center scheduled for defunding on July 1, 1976 has received any communication from the Agency for Child Development advising him or her of the reasons for the

proposed defunding or of the parent's right to a "fair hearing" before the State Department of Social Services;

2] Nonetheless, to date, more than 1,000 parents have made written demands for a "fair hearing" upon the Fair Hearing Unit of the State Department of Social Services;

3] Although many of the demands were mailed more than ten days ago, not a single parent has received any communication from the State Department of Social Services granting a request for a "fair hearing;"

4] More than half of the day care centers made written requests of the Agency for Child Development for a specification of the reasons underlying the defundings; the purpose of this request was to determine whether the defunding was based upon erroneous factual assumptions by A.C.D.; to date, not a single center has received a written response to these letters;

5] Of the 3,054 children currently enrolled at the defunded centers surveyed, only 855, or approximately 28% have received written communication from A.C.D. offering any alternative day care services on or after July 1, 1976. The remaining 2,200 children will be completely without day care at the end of this month;

6] Of the 855 attempted placements, few if any were "adequate." Although complaints from parents covered a variety of concerns by the parents contacted, three of the most common were the following:

a) that the alternative day care center is, for all practical purposes inaccessible to the parent--most children attending day care centers currently are able to walk to their centers; most of the alternative centers are accessible only by bus, or in many cases by two buses; well over 75% of the parents voiced this complaint;

b) that the alternative center is already "over-enrolled" (i.e. occupied by children in excess of its certificate

of occupancy or other readily established standard) or would become overenrolled as a result of transfers proposed by A.C.D.--well over half of the alternative centers reported this condition, with one center (Magic Years) reporting that it was already fully enrolled at 105, but was required by A.C.D. to accept an additional 73 children as a result of A.C.D. referrals from defunded centers;

c) many of the alternative centers expressed overt hostility to the proposed transferees--such hostility results not only from ethnic differences between populations at different centers but also from the unwillingness of alternative centers to disrupt ongoing programs; many alternative centers have refused to speak with parents from defunded centers.

Other common complaints are that the proposed alternative center is unlicensed, is dirty, has a poor program, or is only spanish speaking (if the transferred child speaks English) or vice versa.

Mabel Dean

Mabel Dean

Sworn to before me this

19 day of June, 1976

NORMAN A. FREEDMAN

NOTARY PUBLIC State of New York

03-4627918

Qualified in Bronx County

Commission Expires March 30, 1978

AFFIDAIVT OF PETER SAURER

State of New York)
: ss.:
County of New York)

Peter, Sauer, being duly sworn, deposes and says:

I submit this affidavit in support of plaintiffs' motion for a temporary restraining order and a preliminary injunction.

I am the Director of the Day Care Consultation Service, Bank Street College of Education, 610 West 112th Street, New York, New York. I have studied and analyzed the day care programs in New York City for the last six years. Several months ago the Day Care Consultation Service, realizing that budget cuts were required to be made in the budget of the Agency for Child Development, proposed a plan for "Alternative funding patterns for Day Care in New York City" ("plan"). Under the plan, the present desirable geographic distribution of day care centers could be maintained while the City realized needed budget reductions by means other than closing day care centers.

The essential features of the plan are the following:

1. Instead of terminating all services in 64 day care centers, all 400 centers would share in across-the-board cuts; these cuts would be accomplished in one of two ways:

   a) by reduction of the number of children budgeted for each center and the addition of private or other governmental funds to take up the slack; or

   b) by reduction of budgeted costs per child.

The key ingredient in this plan is to provide day care centers with incentives to seek supplemental funding sources and create a mix of public and private funds. This mix of private, Title XX and other governmental funding for day care centers is the plan which to my knowledge is in operation everywhere in the United States where day care services is provided--except New York City. (An outline of the proposed plan is annexed as Exhibit 1).

The plan has been forwarded to and discussed with the Agency for Child Development and the Mayor of the City of New York. The plan is supported by every single member of the New York Congressional Delegation and many State Legislators and City Councilpersons.

On May 15, 1976, at approximately 12:00 noon, I met with Lew Frankfort, the Executive Director of the Agency for Child Development at his office at 240 Church Street in Manhattan. During our conversation, we discussed the plan which I have referred to above. In substance, Mr. Frankfort stated that the alternative plan was preferable to ACD's plan for massive defunding of centers; that the plan in his opinion could work; that it was rational and that it made sense.

Nonetheless, Mr. Frankfort rejected the plan, stating that the people at the Agency for Child Development were too incompetent to do anything other than make the abrupt cuts which would cause the closing of the centers scheduled for defunding on July 1, 1976.

Peter Sauer

Sworn to before me this
19th day of June, 1976.
NORMAN A FRIEDMAN
NOTARY PUBLIC STATE OF NEW YORK
03-4617918
Qualified in Bronx County
COMMISSION EXPIRES MARCH 30, 1978

EXHIBIT 1-PROPOSED PLAN

AD HOC COALITION TO
SAVE OUR CHILDREN
c/o Day Care Council
205 East 42nd Street
New York New York 10017
MU-5-7017

On May 27th, 1976 the N.Y.C. Human Resources Administration (HRA) and the Agency for Child Development (ACD) announced the defunding of 49 publicly funded day care centers and parts of 29 other day care programs. This horrendous cutback, which will affect several thousand children and parents, is being implemented by HRA and ACD because of cuts in the New York City day care budget.

The Ad Hoc Coalition to Save Our Children, a coalition of day care advocate groups, has put forward the following alternatives to defunding day care centers:

1) PERMIT ALTERNATE DAY CARE FUNDING PATTERNS TO BE USED IN NEW YORK CITY.

2) GIVE ALL DAY CARE CENTERS A FIRM BUDGET AND THE AUTONOMY TO MANAGE THEIR OWN PROGRAMS, RAISE MONEY AND EFFECT COST SAVINGS.

3) RENEGOTIATE THE EXHORBITANT "DIRECT" LEASES.

4) REFORM AND STREAMLINE THE AGENCY FOR CHILD DEVELOPMENT (ACD), THUS REDUCING CENTRAL ADMINISTRATIVE COSTS.

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WHY ARE WE PROPOSING AN ALTERNATIVE PLAN?

New York City's day care budget is being cut drastically, because of a limit on federal, state, and city money available for day care.

We are proposing an alternative plan because:

1) Day care centers are not city agencies. They are private, non-profit organizations run by independent boards of directors. If these groups are given a firm budget and autonomy to run their programs they can cut costs and raise money to stay open, even though the city's own day care budget is reduced.

2) Of the 49 centers slated for defunding, only 10 of them are housed in "direct" lease buildings. The remaining 39 centers have low-rent or rent-free space costs. By closing centers with low rent, the proportion of the day care budget spent on exhorbitant direct lease rentals increases. Less money is available for actual program costs--which means less programs for families and children. Instead of pushing to renegotiate the direct leases, ACD is cutting programs to protect these leases. This is politically unacceptable in light of dwindling public funds available for day care.

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3) We believe that ACD's plan for cutting the day care budget will lead inevitably to closing more day care centers. Although our alternative plan contains some risks, ACD's plan is unworkable. (See page 5 for an explanation of why this is so).

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WHAT IS THE BASIS OF OUR ALTERNATIVE PLAN?

Our plan has as it's basis the following points:

- Do not defund any day care center which is eligible for state and federal funds.
- Push for the renegotiation of direct leases, so that centers housed in such buildings have lower per capita costs.
- Give all day care centers a firm budget, by purchasing services on a per capita (i.e. per-child, per week) basis, and embodied in a written purchase of service agreement.
- Give centers the freedom and autonomy to use this budget as they wish, as long as they are fiscally accountable for the money, and comply with the Health Code and where applicable the Union contract.

HOW WOULD OUR PLAN WORK?

ACD has said that in its budget there is $104 Million available for children in group day care and limited purchase of service or "LPOS" day care.

Under our plan, ACD would purchase day care services from these centers on a per/child/week basis, paying up to a maximum of $65/child/week for pre-school, $40.62/child/week for after-school and $100/child/week for infant care. (These are the maximum reimbursement rates allowed by New York State, through which the 87½% federal and state share of the day care program flows). Note that these reimbursement rates are maximums. Some centers will operate at costs below these.

Because the available $104 Million will not purchase services for every available place in the 390 group and 17 LPOS day care centers, ACD would only purchase day care for 93% * of a center's available capacity.

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* This is a conservative estimate. In fact, if our plan is implemented, we believe that there will be enough money for ACD to purchase 94% or 95% of available capacity . This is because our 93% figure is based on all centers getting the maximum $65/child/week, whereas in fact more than 30% of the centers have costs below this.

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How would centers fund the remaining 7% of capacity? They would do so by (1) fund-raising (see App. A for sources of private money) and by enrolling fee-paying children. **

To summarize what we've said so far, our plan would give each center a firm budget based on the cost of care for at least 93% of their child-capacity.

WHAT ABOUT CENTERS WITH COSTS ABOVE $65 PER CHILD/WEEK? WHAT ABOUT THOSE CENTERS WHO ARE AT OR BELOW $65 BUT WANT TO ENRICH THEIR PROGRAMS?

There are a variety of things that centers can do. Here is a list. (This list is explained in more detail in Appendix "A").

1) CUT COSTS

   A. RENEGOTIATE DIRECT LEASE RENTS.

   B. Let the center plan cost-savings and economies, within the requirements of the Health Code and the Union Contract.

2) USDA FOOD MONEY - Many centers already are receiving these funds. Almost all centers are eligible for them.

3) RAISE MONEY

   A. Local fund-raising by center.

   B. Rent space.

   C. Other services e.g. drop-in, food buying.

   D. Volunteer: in-kind contributions (This can also be viewed as a way to cut costs).

4) OTHER GOVERNMENT PROGRAMS

   A. Title XX training money (local share raised by city-wide fund-raising)

   B. Title XIX

   C. LEAA funds for after-school programs

   D. CETA

   E. ESEA

   F. Money for programs for handicapped children

**"Fee-paying children" may include children of families who are ineligible for publicly funded day care and children whose families are eligible for such care. In the case of the latter, however, government funds do not purchase their care. Parents pay a fee, and the day care center raises funds to pay for the difference between the fee and the full cost of care.

HOW DOES ACD'S PLAN DIFFER FROM OUR PLAN? WHY WILL ACD'S PLAN LEAD TO MORE DEFUNDING OF CENTERS?

Some Background on New York City's Day Care Budget:

In the space of one year (fiscal year 1975-76), New York City's day care budget has been cut drastically. Large cuts were made in the amount of City money available for day care; in addition, day care's portion of federal social services funding (under Title XX) has been greatly reduced.

Over the course of the past year, the budgets of individual day care centers have been cut three (3) times. Centers are therefore already operating on "bare-bones" budgets.

Our plan is different in concept from ACD's announced plan.

Under our plan, you begin by taking the total amount in ACD's budget available for group and LPOS day care. This money would then be used to purchase day care services on the basis of a per/child/per/week cost, up to the maximum allowed by New York State ($65/week for pre-school, $40/week for after-school, $100/week for infant care). * Services would be purchased from all of the currently operating day care programs. Centers would not be "defunded".

ACD's plan begins by defunding 49 group day care centers and parts of 29 others. It then takes each center's budget as of the end of FY 1975-76 (that is, the already reduced budget as described above) and cuts each budget by another 8-10%, regardless of what the center's present per-child cost is.

This method of making cuts results in:

1) Less day care places for children in New York City, because at least 49 centers are actually forced to close.

2) Inequities to less expensive programs (primarily those housed in low or no-rent space) because regardless of their current low per/child week costs, they will be cut another 8-10%. (According to ACD's most recent figures, direct lease centers will get $12/week/child more than centers housed in low or no-rent facilities).

3) Placing more expensive centers at risk. ACD is asking New York State to "waive" its per/child reimbursement rates for the many day care centers which are operating at above these rates. ** Most of these centers have high costs because they are housed in direct lease buildings. We think that the State will refuse to waive these limits because:

   a) They understand that the extra money will be used to subsidize landlords' profits on direct lease centers.

   b) They know that the following agencies are investigating the direct lease rents: The N.Y.C. Comptroller's Office; The Manhattan D.A.'s Office; the Federal Department of Health,

* There is very little infant care in these day care programs.

** $65/week pre-school, $40/week after-school, $100/week infant

Education and Welfare; the Mayor's Task Force; other investigations not yet mentioned in the press.

If the State refuses to waive the reimbursement limit, then, in addition to being cut 8-10%, these centers will also be cut by the difference between the reimbursement rates and their actual cost per child in excess of these rates. According to recent ACD figures, at least 130 centers will be spending over $65/child/week even after their budgets are cut by 8-10%.

If this happens, then centers will either have to raise huge amounts of money with no warning or cut their programs to below health code standards (which is illegal) or the City will have to subsidize them. But since the City has no extra money to subsidize them, they will either be forced to close or the City will have to defund more centers to keep these ones open.

The city's plan is risky because it assumes money will be made available from the State and City, but includes no contingency plans in case this money is not made available. Our plan is less risky, because it is based upon conservative estimates of money that is currently available.

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Under our alternative proposal, we start with the State's allowable reimbursement rates. We recognize that centers housed in direct lease sites will face great hardship. But the hardships will be greater under the City's plan because:

1) These centers will not be able to do any pre-planning, since the State's refusal to waive reimbursement rates (now under discussion by ACD and the State) will come very suddenly and will be on top of the 8-10% announced cuts.

2) ACD's plan is designed to protect the direct lease rentals by subsidizing them with city, state, and federal day care money. There will be very little pressure to renegotiate the leases. Under our plan it is absolutely clear that leases must be renegotiated because they are the main factor in high day care costs. The City will then be forced politically--much sooner--to take steps to renegotiate the leases.

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GIVE DAY CARE CENTERS AUTONOMY TO MANAGE THEIR OWN PROGRAMS, RAISE MONEY AND EFFECT COST SAVINGS.

Essential to our plan is that centers receive a firm budget and the freedom and autonomy to organize their operations and structure to cut costs and raise money.

ACD's plan requires that centers receive a line item budget from ACD. They have little or no flexibility to reorganize their budget except on other-than-personnel-services. ACD will pay centers 90-92% of these budgets and require the centers to raise the balance. Under the City's plan, if a center effects any cost savings in its budget the bottom line of the budget is lowered--90% of the savings accrue to ACD, only 10% of the savings go to the center. This policy continues the disincentive to cost savings by centers.

This disincentive to cutting costs, the line item budgets prescribed by ACD (rather than the centers), and the required fund raising all make creative fund-raising difficult. In order to raise significent amounts of funds from either private or government sources, centers must have the freedom to reorganize themselves and their service delivery systems to accomplish these tasks. If for example, they can manage to receive Title XX Training money to pay for the salary of the director, the center must have the freedom to use, in other ways, the money saved (e.g. to pay for a family worker, who would then help to generate private funds through the other means described above). Our plan provides this flexibility; the City's does not.

Raising money from private and government sources for training and other services requires the centers to add new staff; directors and classroom staff can not provide these services without additional personnel. However, the city plan limits the spending of raised money to the ACD mandated budget and staff only. ACD's requirement that centers raise 8 to 10% of their budgets is defeated by the requirement that all money raised be spent only according to the budget which ACD imposes on the center. Under the City's plan, centers have the freedom to re-organize only after they have raised the required 8 to 10%. Our plan gives the centers this freedom from the beginning, which vastly facilitates the ability of a center to fundraise.

Day care centers provide many more services to their families and communities than those child care services paid for by ACD. Fund raising for day care centers will be less difficult as the centers begin to clarify and expand those other services. Funds are available for other services; centers need the freedom to reorganize to receive these funds. Our plan for funding centers encourages and provides real incentives for multiple funding. The City's plan does not.

REFORM AND STREAMLINE ACD

On March 8, 1976 a Task Force appointed by Mayor Beame to review ACD's day care program issued its report.

The report stated bluntly that there is incompetence at almost every level of ACD, and made some specific recommendations on how ACD needed to change.

None of these recommendations have been carried out. In fact, ACD has focused almost all of its time and attention on defunding programs to families and children, rather than reforming and streamlining itself.

If ACD were to reform and streamline itself, money could be redirected to services. But money is not the only issue. As the Task Force report states, a reorganization is badly needed so that the day care program can be more effectively administered.

If our alternative plan were implemented, potential savings in ACD central costs could be implemented. To take just one example, ACD's present system of funding requires that every time a budget modification is proposed by a day care center, it be reviewed by both program and fiscal staff at ACD. Under our alternative plan, centers are freed from a rigid, line-item budget. They can make their own modifications. Thus, the extra layer of monitoring now required to authorize minor budget modifications could be eliminated.

APPENDIX A

Centers above $65/child/week can do some or all of the following to cut costs and raise money:

1. CUT COSTS

   a. Renegotiate direct leases: Under this proposed plan, the costs of direct lease rents, which are currently part of the calculation of a center's per child costs, would be included in the purchase of service agreement, and any renegotiated leases resulting in savings would mean additional funds for the center's program. This is a real incentive to involve the centers in renegotiation. It also makes clear--rather than hiding--the fact that the direct leases are a major factor inflating day care costs.

   While renegotiation of the leases will not happen immediately, some rents have already been stopped by ACD and the Comptroller's Office. And enough steps have been taken by the city to assume that at least some of these leases will be renegotiated during the next fiscal year.

   b. Make cost savings and economies that centers plan, within Health Code and Union Contract: Given flexibility in determining their own budgets, staffing patterns, and service delivery systems, centers can have more room to creatively cut costs and make economies. Equipment, substitutes, bookkeeping services, maintenance, purchasing are all areas where savings can be made if these savings and consolidations are made by each center according to where they can achieve savings, rather than having irrational dictums mandated by ACD which force centers to make the same types of cuts regardless of size and kind of program.

2. RAISE MONEY

   a. Local Fund-raising: Many centers are already experienced with fund-raising locally through: bake sales, street fairs, raffles, dances, selling take-home dinners, etc. Centers have raised as much as $20,000 per year this way. Even the most inexperienced center can expect to raise at least $6,000 this way. The day care community is prepared to share fund-raising ideas and strategies, so the more experienced centers help the others.

   b. Rent space: Centers with large spaces can rent space on a permanent or occasional basis to city and neighborhood organizations. The purchase of service agreement should authorize direct lease centers to be able to rent space in this way. At present neither the centers nor ACD are sure whether or not this is possible.

   c. Other services are drop-in, food buying: Centers can expand the services they provide and expand their income from private and government sources--adding two "drop-in" spaces for each classroom, and charging an hourly fee for families who need part-time child care on a regular basis during the week to attend classes, meet clinic appointments, do shopping, etc. The hourly fee to be pro-rated to the approved per child cost. Adding food cooperatives and buying clubs-the center keeps a percentage of the savings--Selling prepared evening meals; it is more healthful and less expensive then frozen commercial dinners.

d. City-wide fund-raising: A coalition of city wide day care agencies such as the Day Care Council, Bank Street and others would be formed to do this fund raising. The burden of this work would not be on the centers. The money raised in this way would provide the non-Federal share of Title XX training funds--an attractive 4 to 1 match for donors!

Fund-raising would be through Foundations concerned about the city financial crisis; public service advertising on radio, T.V., and the print media; theatre benefits, etc.

e. Volunteer: in kind contributions- by evaluating donated services of parents, neighbors, doctors, lawyers, etc. centers can maintain their approved per child costs and charge private fee paying children less than the full costs of care.

3. USDA FOOD MONEY : Our proposed plan makes day care centers clearly eligible for these funds, because under our plan there is no violation of USDA Maintenance of Effort provisions. (Under ACD's plan, centers' food budgets are being cut and they are to replace this money with USDA funds- a clear violation of maintenance of effort requirements). Several day care centers, the Day Care Council, Bank Street, Students from City College, and the Community Service Society have all begun to mount a city-wide technical assistence effort to supplement what ACD is doing to help centers apply for and receive these funds.

4. OTHER FEDERAL PROGRAMS:

a. Title XX Training Money: Title XX Funding for Training is available through an appropriation which is separate from Title XX funds for services. The federal ceiling on Title XX funds does not apply to Training funds. These Title XX training funds are available as additional revenue for day care centers.

Day care centers in New York City do a considerable amount of in-service training as an integral part of their total daily and weekly operations. This training function should be funded with training dollars, not service dollars. Each day care center could document its own in-service training and the amount of time that each staff member devotes to workshops, training meetings, assessment, supervision, etc.; that portion of the center's program would be funded through training funds. A number of teacher training institutions are available as resources for program assessment and to validate the quality of the in-service training. While it will vary from center to center, we estimate that between 5% and 15% of a center's total budget can be funded this way. The non-federal share of the training funds can be raised by the day care community city-wide.

This strategy paying for training as an integral part of a center's total operation has been discussed with the State and HEW. It is similar to the way Title XX funds for training are used in Connecticut, where $17 million per year is now being spent for training.

b. Title XIX EPSDT: New York City and State are required by federal law to provide Early and Periodic Screening, Diagnosis and Treatment (EPSDT) to all medicaid-eligible children in the State. They are just beginning to try to fulfill this requirement. Day care centers could contract with major EPSDT providers (i.e. hospitals and clinics) to perform the screening function in the day care center. (Note: a number of centers already do this on an informal, unpaid basis).

c. An as yet unexplored source of funds for day care center's after-school programs (which serve older children) is money from the Law Enforcement Assistance Administration (LEAA), which is currently taking an interest in delinquency problems of pre-teen children.

DAY CARE COUNCIL OF NEW YORK, INC.
205 East 42nd Street (212) 685-7017 New York, N.Y. 10017 32

NOTES OF A MEETING IN NASSAU COUNTY
ON SUPPLEMENTARY FUNDING SOURCES FOR DAY CARE

June 16, 1976

I. C.E.T.A.

A. Adult Work-Experience Program

Most of us are familiar with this program as it functions through New York City's Manpower Agency. In Nassau County, however, these funds are used to employ teachers in day care centers at a reimbursed salary level of $6,000 with a supplement, up to the prevailing rate for teachers, supplied from Title XX funds. Under the new regulations, agencies are no longer required to offer on-going employment to C.E.T.A. personnel and any person who has been unemployed for 7 days can qualify for C.E.T.A. employment under Title I. (This may be a source of funds with which to rehire family counselors after their first 7 days of unemployment.

B. Support Services

In addition to jobs, C.E.T.A. also provides funds to employees in the program to enable them to purchase day care for their children. This works in much the same way as the cash grant available to centers serving children of W.I.N. participants. The only requirement is that the day care center obey the Federal Interagency Guidelines.

II. U.S.D.A. Child Nutrition Act Funds

Although New York City already has well-developed plans to utilize this source of funds, some question still remains as to whether or not every center will be eligible by July 1. It is important to note,

therefore, that for centers which cannot qualify as tax exempt entities, they can be made eligible if they are sponsored by another non-profit, tax exempt agency.

III. COMMUNITY DEVELOPMENT ACT

This is a relatively new program which combined funds formerly available to model cities and urban development programs. It is awarded by H.U.D. to a local governmental agency (in our case, this is probably H.D.A.). It includes some special categories of funds for day care, in particular - These funds are available to "extend" an existing program. Such extensions can include capital expenditures as well as operating funds. However, it is limited to one-shot projects. For information: S. William Green, Regional Administrato
D.H.U.D. Regional Office
26 Federal Plaza
New York, N.Y.

IV. B.O.C.E.S. (Board of Cooperative Education Services)

Provides to the handicapped, adult and consumer education (parents). For information contact:

Division of Occupational Education
State Education Department
Albany, New York

V. HANDICAPPED EARLY CHILDHOOD ASSISTANCE PROGRAM

Provides support for experimental pre-school and early childhood programs serving handicapped children. For information:

Handicapped Early Education Assistance
Division of Education Services
Bureau of Education for the Handicapped
Albany, New York

VI. NEW YORK STATE FAMILY COURT ACT - SECTION 232

Provides open-ended funds for handicapped children. "Handicapped" is defined as children who are handicapped by reason of family breakdown or other family problems. Contact:

Mr. William Staples
Bureau of the Handicapped
State Education Department
99 Washington Avenue
Albany, N.Y. 12220

VII. STATE COMMISSION FOR THE VISUALLY HANDICAPPED

Provides free staff in day care centers which are willing to enroll "legally blind" children. A legally blind child is a sighted child with greatly impaired vision (glasses).

VIII. E.S.E.A. Mini-Grants for Special Programs in Day Care Centers - Title III.

This can be used to supply the salary of some staff member who may have a special skill, i.e., in music, science, etc. and who can be designated as the one responsible for developed the science or music curriculum in a day care center. For information contact:

Mr. Richard Burton
Mini-Grant Coordinator
State Education Department
Albany, New York

AFFIDAVIT OF MARTIN A. HOTVET

State of New York)
: ss.:
County of New York)

Martin A. Hotvet, being duly sworn, deposes and says:

1. I am submitting this affidavit in support of plaintiffs' motion for a temporary restraining order and a preliminary injunction.

2. I am an attorney duly admitted to practice in the Courts of New York and the United States District Court for the Southern District of New York.

3. On June 10, I represented S.E.R.A. Day Care Center, 1771 Andrews Avenue, Bronx, New York, at a meeting to discuss its defunding held in the offices of the Agency for Child Development, 240 Church Street, New York, New York (hereinafter A.C.D.).

4. Lew Frankfort, Executive Director of A.C.D., presided over the meeting.

5. He stated that A.C.D. was required to defund enough centers to effectuate savings of 15 million dollars. He stated that there are no regulations governing defunding, but that the criteria for defunding were set forth in the annexed Attachment B, which Mr. Frankfort gave to me.

6. He stated that S.E.R.A. was defunded on the basis

of three of these factors; 1) low utilization rate; 2) high per capita cost; and 3) the availability of alternative day care centers (principally Grammercy Boys Club, to take 16 of S.E.R.A.'s 33 children).

7. He stated that the defunding decisions were final and would not be reviewed, on the authority of J. Henry Smith, the Administrator of the New York City Human Resources Administration, which includes A.C.D. among its various divisions.

8. He stated that parents of children in defunded day care centers would be contacted directly by mail and told where they might find alternative day care services.

9. He stated that there are not enough alternative facilities for the children in defunded centers, particularly in the Lower East Side.

10. He stated that a policy of priorities among children of defunded centers had been determined about 48 hours before our meeting, as follows: first priority to abused and neglected children; second priority to children of working parents; third priority to children of parents in training.

11. He stated that no regulations had been promulgated setting forth these priorities.

12. When I asked him if A.C.D. had considered the

legality of their action before they made their decision to defund the centers, he said they had not. He said that the cuts and defundings were made precipitously because "the axe was over us." A.C.D. needed to get its fiscal plan in shape immediately, pursuant to the mandates of higher budgetary authority.

Martin A. Hotvet

Martin Hotvet

Sworn to before me this

21 day of June, 1976.

[illegible]

Notary Public, State of New York

Qualified in [illegible] County

Commission Expires [illegible] 1977

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PROPOSING DCC REDUCTIONS

ATTACHMENT B

CRITERIA USED IN PROPOSING DCC REDUCTIONS

1. FISCAL CRISIS
2. LOW UTILIZATION
3. HIGH PER CAPITA COST
4. FACILITY PROBLEM
5. ALTERNATE SERVICE AVAILABLE NEARBY
6. SPONSORING BOARD PROBLEMS
7. FISCAL MISMANAGEMENT
8. PROGRAM QUALITY
9. OTHER

** ON-GOING FIXED COSTS (DIRECT LEASES)

AFFIDAVIT OF PAMELA SCHNEIDER

State of New York)
: ss.:
County of New York)

Pamela Schneider, being duly sworn, deposes and says:

I am one of the plaintiffs herein. I make this affidavit in support of plaintiffs' motion for a temporary restraining order and preliminary injunction.

I have two children, ages 3 and 5, currently enrolled at the Chelsea Children's Center, 300 Ninth Avenue, New York, New York, a day care center which the Agency for Child Development has threatened to defund as of July 1, 1976.

To date the Agency for Child Development has not advised me of the offer or availability of alternative day care services, and I have personally determined that no such alternative services are available within one mile of my home.

On advice of counsel, I have requested a "fair hearing" but defendants have not responded to my request.

I am blind. I am separated from the father of my children, and neither I nor my children receive support from him. My sole source of income is a social security disability check. I have been actively seeking employment for some time, but have been unsuccessful. My present plans are to enroll in Social Work School in September.

If Chelsea Children's Center is closed on July 1, 1976, I do not know how I will be able to care for my two young children. Even if my lack of sight does not prevent me from caring for them, I will be forced to remain at home and abandon any plans for educational training and subsequent employment.

Equally important, my children will be deprived of the companionship of other children and the tutelage of trained teachers.

I have discussed Chelsea Children's Center with the Program Director and my children's teachers on numerous occasions, and I am more than satisfied that the program is excellent.

I am advised by the Director of our Center that not a single parent has been offered alternative day care services for his or her children as of July 1, 1976.

Pamela Schneider
Pamela Schneider

Sworn to before me this

day of June, 1976.
NORMAN A. FREEDMAN
NOTARY PUBLIC State of New York
03-46-7918
Qualified in Bronx County Comm. Exp 3/30/78

State of New York)
: ss.:
County of New York)

MABEL DEAN, being duly sworn, deposes and says:

I have read the foregoing affidavit to Pamela Schneider, and she has acknowledged that the contents are true.

Mabel Dean

Sworn to before me this

day of June, 1976.
NORMAN A. FREEDMAN
NOTARY PUBLIC State of NEW YORK
03-46-7918
Qualified in Bronx County
Comm. Exp 3/30/78

AFFIDAVIT OF PAT WHITE

State of New York)
: ss.:
County of New York)

Pat White, being duly sworn, deposes and says:

I am one of the plaintiffs herein. I make this affidavit in support of plaintiffs' motion for a temporary restraining order and preliminary injunction.

I have a three-year-old son, L'Andre, who attends Children's Workshop, 199 Victory Boulevard, Staten Island, New York. Children's workshop is scheduled to be defunded by the Agency for Child Development on July 1, 1976.

I have received a letter from A.C.D. advising me that my child is being transferred to Richmond Early Learning Center, 159 Broadway, Staten Island. That center is accessible from my home only via a bus ride, the trip being 30 minutes door to door.

I am a single parent. Neither my child nor I receive any support from my child's father. I am required to work to support my child. My place of business is in upper Manhattan.

If the Children's Workshop is forced to close, the result will be that I will have to quit my job and seek welfare payments. It will be impossible for me to take my children to the substitute center and still get to my job on time in Manhattan. Nor do I wish to have my three-year-old child spend one hour each day riding a bus.

I am a member of the Board of Directors of Children's Workshop --- as is every other parent at the center. Our center has a unique and excellent educational program which has been in existence for several years. We have no idea why we were chosen for defunding. Indeed, on May 29, and again on June 14, 1976, Bernadette Anyanwu, our chairperson, wrote to the Executive Director of A.C.D. requesting the reasons for defunding (see Exhibits 1 and 2 hereto). We have as yet heard nothing from A.C.D. We would like the opportunity of contesting the defunding in a fair hearing.

Patricia White
Pat White

Sworn to before me this
18th day of June, 1976.

Notary Public, State of New York
Qualified in Nassau County
Commission Expires March 30, 1977

EXHIBIT 1-LETTER FROM CHILDREN'S WORKSHOP INC. TO AGENCY FOR CHILD DEVELOPMENT

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Children's Workshop inc. 199 Victory Blvd., S.I., N.Y. 10301

May 23, 1976

Mr. Lew Frankfort, Interim Executive Director
Agency for Child Development
240 Church Street
New York, New York 10013

Dear Mr. Frankfort,

Your office has determined that our center shall be defunded as of June 30th, 197 .

I request of you, in writing, the final evaluation of our entire program and the reasons for your concluding that Children's Workshop should be terminated.

Sincerely,

Bernadette Sharpe

Bernadette Sharpe
Chairperson
Board of Directors
Children's Workshop

cc: [illegible]
Ar

No 885 $1 53/100

RECEIVED OF PETTY CASH

DATE JUN 14 1976 19

FOR U.S.P.O.
(Certified Mail to Lew Frankfort)

CHARGE TO Postage
ACCOUNT

APPROVED BY RECEIVED BY

TOPS FORM 3008 LITHO IN U.S.A.

mailed June 3, 1976

POSTMARK

The following service is requested (check one)
[ ] Show to whom and date delivered ..... 15¢
[ ] Show to whom, date, & address of delivery .. 35¢
[ ] RESTRICTED DELIVERY
Show to whom and date delivered ..... 65¢
[ ] RESTRICTED DELIVERY
Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Lew Frankfort - ACD

3. ARTICLE NUMBER

RETURN RECEIPT

No. P 220091

RECEIPT FOR CERT

SENT TO
Lew Frankfort
STREET AND NO.
ACD 240 Church St
P.O. STATE AND ZIP CODE
NY NY 10013
POSTAGE
CERTIFIED FEE
RETURN RECEIPT
RESTRICTED DELIVERY
SHOW TO WHOM AND DATE DELIVERED
RESTRICTED DELIVERY
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY
TOTAL POSTAGE AND FEES

PS Form 3800 Jan. 1970

$1.53

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EXHIBIT 1-LETTER FROM CHILDREN'S WORKSHOP INC. TO AGENCY FOR CHILD DEVELOPMENT

44

Children's Workshop inc. 177 Victory Blvd., S.I., N.Y. 10301

June 14, 1976

Mr. Lew Frankfort
Interim Executive Director
Agency for Child Development
240 Church Street
N.Y.N.Y. 10013

Dear Mr. Frankfort,

On May 29, 1976, we requested of you, in writing, your final evaluation of our entire program and your reasons for concluding that Children's Workshop should be terminated.

You have not responded to that letter, hence, this is the second request for that information.

Additionally, to date, Mr. Michael Frey has not settled the outstanding $15,000 on our renovation contract, although it was agreed last April that both cash and goods were owed to this project.

Please forward to us the requested information at your earliest convenience.

Very truly yours,

Bernadette Anyanwu

Bernadette Anyanwu
Chairperson
Board of Directors
Children's Workshop Inc.

cc: Dick Ash, Esq.
Jack Littman, Esq.
Anthony Gaeta, Councilman

AFFIDAVIT OF MARIE MYRTIL

State of New York)
: ss.:
County of Kings)

Marie Myrtil, being duly sworn, deposes and says:

I am one of the plaintiffs in this action. I make this affidavit in support of plaintiffs' motion for a preliminary injunction.

My daughter, Elmyra, is four years old. She attends Little People's Day Nursery School, 9414 Church Avenue, Brocklyn, New York. Little People's is scheduled to lose its Agency for Child Development funding on July 1, 1976.

I have received a letter from the Agency for Child Development referring my child to another center, Bruekelen Recreation Center, at 105th Street and Flatland Avenue. I consider this placement to be totally inadequate and tantamount to no placement at all.

In February of this year I underwent surgery for thrombophlebitis in my leg. I have been virtually bedridden since that time. The Bruekelen Center is accessible to my home only by two bus-rides and a long walk. I simply am unable to make that trip with my daughter.

In addition, my daughter has an emotion problem which, when she started going to Little People's, was so severe that she could not speak at all. Since that time she has been at Little People's she has improved her condition, but I am advised that any change in her environment at this time would be emotionally upsetting to her. I am unable to care for my child at home presently, and my child is unable to continue to get the therapy she requires either at home or at another center.

The other 33 parents at Little People's Nursery School join me in seeking a fair hearing in order to contest the scheduled closing of our day care center.

Marie Myrtil

Marie Myrtil

Sworn to before me this
19th day of June, 1976.

Donald Aleman

DONALD A. ALEMAN
Notary Public, State of New York
No. 21-7157175 Qual. in Kings County
Term Expires March 30, 1978

NY State
Kings

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AFFIDAVIT OF "JANE ROE"

State of New York)
: ss.:
County of Kings)

"Jane Roe", being duly sworn, deposes and says:

I am one of the plaintiffs in this action. I make this affidavit in support of plaintiffs' motion for a temporary restraining order and a preliminary injunction.

My child "Baby Roe", who is four years old, attends Beachbrook Nursery School at 2953 Avenue X, Brooklyn. Beachbrook is a limited purchase of services center which is presently scheduled to lose its funding as of July 1, 1976.

My child is emotionally handicapped. My child was referred to Beachbrook by the Coney Island Hospital, Child Psychiatry Department. Beachbrook was selected because it is the only day care center within five miles of my home which serves the needs of "special" children, i.e., children who are emotionally handicapped (see Exhibit 1 hereto).

I am advised by my child's teacher that the imminent closing of Beachbrook would be detrimental to my child's health. We cannot afford private treatment.

Among the services offered by Beachbrook which are required for my child is a one-to-one teacher-child setting and family counselling which my husband and I attend. The significance of Beachbrook has been commented upon by more than one outside professional. (See, e.g., Exhibit 2 hereto).

Beachbrook is a unique day care center. Only one other center in Brooklyn serves the emotionally handicapped and that center has enrolled 12 more children than its 55 capacity. Beachbrook has been serving children in Brooklyn for 28 years. Indeed, Beachbrook was unique enough in 1966 to be written up in the New York Herald Tribune (see Exhibit 3 hereto). See also Exhibit 4 hereto which is a brief precise of the programs offered by Beachbrook.

Not a single one of the parents of the 22 children attending Beachbrook has received any offer from A.C.D. of alternative daycare or other equivalent services.

Like most of the parents at Beachbrook, I have requested a fair hearing to contest the closing of Beachbrook. To date no response to my request has been forthcoming. The parents at Beachbrook believe that our center is unique, of high quality and absolutely necessary to the welfare of our children. We would welcome the opportunity to present our evidence at a fair hearing.

Jane Roe

"Jane Roe"

Sworn to before me this
9 day of June, 1976.

Harold Friedman

HAROLD FRIEDMAN
NOTARY PUBLIC, STATE OF NEW YORK
[illegible]
Qualified in Kings County
Cert. filed in Kings Cty. Clerk & Reg.
[illegible]
3/30/78

EXHIBIT 1-BEACHBROOK NURSERY SCHOOL
FACT SHEET

49

Beachbrook Nursery School

2953 AVENUE X BROOKLYN, NEW YORK 11235 • (212) 648-7162

FACT SHEET

Beachbrook Nursery School is a Limited Purchase of Service center with 22 ACD funded children and 48 tuition-paying children which includes several scholarships.

The Agency for Child Development informed Beachbrook on May 27 1976 that ACD funding will be terminated as of 7/1/76

Beachbrook is one of the very few day care rograms in all the 5 boroughs which accepts and treats HANDICAPPED children

Beachbrook has been MAINSTREAMING special children for over 15 years and is considered a model program

Beachbrook is a training center for Early Childhood and Special Education teachers and nurses.

Agency for Child Development announced the criteria for the cuts through the media - NONE OF WHICH APPLY TO BEACHBROOK

1)Beachbrook's weekly per child ACD reimbursement is under $65.

2)There are no nearby day care centers in the area to service over 8000 families in the Sheepshead-Nostrand Project of which Beachbrook is a part

3)There are no available programs for the handicapped ACD-funded children

4)Beachbrook has excellent Day Care attendance

5)BEACHBROOK PAYS NO RENT

6)Beachbrook has sound fiscal management

Beachbrook has a waiting list of almost 100 people

Most of Beachbrook's ACD funded families are working citizens

Without ACD some parents will have to stop working

Beachbrook supports the alternate plans for day care centers proposed by AD HOC Coalition to Save Our Children and the day care community.

Beachbrook Nursery School
2953 AVENUE X BROOKLYN, NEW YORK 11235 • (212) 648-7162

The following families are coded in order to respect confidentiality and privileged information.

Family 1 - The mother is disabled and unable to care for her two young children. There are four children. The father's income in within Title XX guidelines.

Family 2 - Single woman who works and has two children. She will have to go on welfare if denied care.

Family 3 - Child developmentally immature, needs special support in classroom. Mother at home cares for newborn, father's income within Title XX. There is also an older child, 7 years.

Family 4 - History of child abuse. Mother on welfare and in treatment.

Family 5 - Single working mother with three children. Will have to go back on welfare.

Family 6 - Single mother with three children. Finished college and is seeking employment.

Family 7 - Child is asthmatic, medical referral. History of instability in home.

Family 8 - Both parents work, income within Title XX. Child developmentally immature, needs special support in regular classroom.

Family 9 - Mother on welfare, is now in training program. Child needs one to one relationship. Are working on integrating him into larger group activities. After another year, we feel he can make it in a regular public school setting.

Family 10 - Working single mother with three children. Will have to go on welfare.

Family 11 - Working single mother with three children. Will have to go on welfare.

Family 12 - Single working mother, one child, will have to go back on welfare. She just started working.

Beachbrook Nursery School
2953 AVENUE X BROOKLYN, NEW YORK 11235 • (212) 648-7162

Family 13 - Hospital referral, child is considered seriously emotionally disturbed. Child needs one to one relationship in our therapeutic nursery setting.

Family 14 - Single working mother with three children. Was on waiting list for two years because there were no places. In that time, the child did not live at home, but with his great grandmother. The other children were with other relatives because the mother could not afford care. The family lived together on weekends. The child is hyperactive, is now learning how to play and relate to peers. He has a one to one relationship in a regular classroom.

Family 15 - Medical referral, home unstable, mother in treatment, on welfare, three children. Parents divorced, father institutionalized for alcoholism.

Family 16 - Both parents work (mother part-time), income within Title XX, three children in family. When child first entered program 2 years ago, he was developmentally immature and hyperactive. Can participate well in regular class but needs continuing support until entry into public school next year.

Family 17 - Hospital referral, child is seriously emotionally disturbed. Has already been diagnosed in various places as both schizophrenic and autistic. Is erratically toilet-trained. Needs one to one relationship in therapeutic nursery setting. Three children in family, income within Title XX. Father works, mother home with new infant.

There are two sets of twins in the program for 19 children, and three other children who will be leaving the program for a total of 22 children.

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Sunday, January 23, 1966 New York Herald Tribune

EXHIBIT 2-NEWSPAPER ARTICLE

52

A School Where Problem Children Learn to Live With Others

By Francis Sugrue
Of The Herald Tribune Staff

"Our nursery is unique. But we feel we shouldn't be unique. We wish we weren't unique. It would be better if there were many schools like ours."

This was one of the statements that came spontaneously from a discussion with a group of teachers of the Beachbrook Nursery School, which is now on the ground floor of the Sheepshead-Nostrand housing project, at 29-53 Ave. X, in Brooklyn. If the reporter's notes are correct it was Miss Leah Shain who initiated the remark and all the other teachers present vigorously nodded their heads in agreement. What they meant by the unique character of the school is this: Beachbrook, a non-profit parent cooperative nursery school, has evolved a program in which children with severe physical and emotional handicaps are accepted in a nursery school with normal, healthy children. Some of these children are brain-injured, schizophrenic, a blind autistic, an epileptic with severe ego pathology, borderline psychotics, and the mentally retarded.

And the result of this program, according to Rosalind Wiener, the director of the school, is that everyone seems to be reaping benefits—the disturbed children who slowly begin to react and identify with a healthy environment; the normal children who come to understand and are better able to express their own needs and problems to the teachers; the parents who find a kind of satisfaction and even enrichment in this atmosphere of community responsibility, and the teachers who respond to the realization that there is more depth and fulfillment in their vocation than they dreamed of.

There are 127 pre-school children at Beachbrook, and 20 of these are considered emotionally handicapped. Although the waiting list is long for both normal and problem children, it is felt that the balance must be 75 to 80 per cent in favor of the healthy children to make the plan work.

Miss Wiener believes the school is unique. She knows of only one nursery—in Portland, Ore.—which is doing something similar, and she has heard that there is one in Toronto.

"But there should be schools like this all over the country," she said, "all over the world. Isn't a healthy environment the right of every child? Don't they have the right to associate with normal children? Should there be separate but equal schools for the emotionally handicapped? And when you place them in a normal setting such as we have at Beachbrook you begin to notice a profound difference in the children."

PLAY TIME—Blocks and puzzles hold the children's interest in this afternoon class.

There is the little boy seriously disturbed who would express himself by painting, not using just his fingers, but the entire palm of his hand. He was always a frightful mess. Now, he uses a brush. He is proud of this. He knows his teacher is satisfied with him because of his efforts with a brush. He is noticing the other children in his room. Slowly, it is hoped he will reach out to them.

There was Greco who first came to school robot-like, frightened, a wooden soldier who didn't expect anyone to play with him. Now his movements are free, flowing, music seems to add some grace to his walk, and now he goes about the room with more confidence.

Little things, yes, but very important in the manifestation of a disturbed personality.

Take Frank, diagnosed as retarded, schizophrenic, brain-injured. His only form of action was to crawl on the floor caterpillar-style and climb up a child's back, usually a girl, and pull her hair. He had this thing for spinning objects. He'd watch a record player or a washing machine going round and round for long periods of time. Now this is behind him. He is in with the other children. He plays with them. He belongs. He's learning to read and they hope that in a year he can move on to second grade. Some of his obsession for whirlwinds remains, however. His favorite words are cyclone, typhoon, hurricane.

There is Jenny who withdrew from all activity and found it difficult to look anyone in the eye. Finally, a teacher decided if she gave her a bath every day she might finally be able to establish some communication with the child. It turned out this was a very effective therapy for establishing communications with some children. The teachers have their eyes on all of them. The boy who is constantly moving his hand, biting the rubber toys, acting as though he is certain that if he were still for a moment he might explode into little bits.

"And the girl the doctors said should be placed in an institution. We felt she was too much of a behavior problem to be plainly retarded," said Miss Wiener. "There must be some emotional problems blocking her progress. A strange little girl. Always running out of the class room. Hanging on someone until she pulled them down. Slowly she is changing and she hasn't had any of her epileptic fits since she has been here."

All of them—normal and disturbed—want to feel strength and power and also to destroy some of the adult images in their fantasy games. In Miss Shain's room we watched the children feel their "strength" by wearing red capes and scurrying around the room as Superman, or Batman or whatever they thought they were. And others were getting a sense of "power" by erecting a building of blocks that towered over their heads. And then they brought it tumbling down to the floor with defianted cries of childhood triumphant.

"There has to be a healthy majority in a school like this," Miss Shain was saying. "There has to be this pull of gravity towards health. . . . And in a healthy rather than a sick atmosphere the teacher can give more to the disturbed, because she knows she is leading them somewhere that is beneficial. And after spending some time with a disturbed child, she can then go to the healthy child and receive some nourishment herself. In this environment, when a disturbed child is ready to react he has a healthy child with whom to become involved. He is not always being drawn back into an unhealthy atmosphere. Sometimes he gives this response for a matter of seconds, but it has been for the good. He has moved forward."

In more formal language, Miss Wiener explained what was really going on in the classrooms, where, at times, to the outsider, chaos seemed to be the name of the game.

"Here a child is able to relive, restructure and clarify his world," she said. "He can select toys and materials from the classroom and use them freely, flexibly and symbolically. Here, he can recreate conflict and give it resolution. Here he can create his own limits and practice living up to them. This is one of his greatest resources for digesting, clarifying, practicing and internalizing the difficult discipline demands required in the process of socialization. This then becomes the child's most significant vehicle in the development of self-control. When this kind of play includes two or more children (dramatic play), it offers its greatest potential to all areas of development."

All this was very nicely put, but there was a very human question that had to be asked about this school. "How do the parents of the normal children take to the idea of having their little ones going to school with problem children?"

Miss Wiener didn't have to dodge this question. She explained that the school was founded 20 years ago, but has only been working with the disturbed children for about five years. "And every year the new parents are concerned," she said. "They usually have the same question. 'What's going to happen to my child playing with disturbed children?' And everytime one of the parents who has been with us for a few years gets up and replies, 'But it works! Just wait and see.' And they wait and see and find out it does work."

Incidentally, Beachbrook is governed by a board of directors elected by the parents. Each class has two teachers, and there is a consultant psychologist who meets with the staff once a week and leads two weekly parent workshops. The school attempts to be integrated in more ways than one. It seeks to have a balanced composition of race, religion and class. There are 33 Negro children attending the school.

The school has one other item that should be mandatory in every playground. An old automobile—a Hillman in this case—which belongs entirely to the children and is to be used as their imagination sees fit except outside the playground.

AFFIDAVIT OF LYNN ANN TYLER

State of New York
County of New York ss.

Lynn Ann Tyler, being duly sworn, deposes and says:

I am one of the plaintiffs herein. I make this affidavit in support of plaintiffs' motion for a temporary restraining order and preliminary injunction.

My son David is two years old. He presently attends Seton Day Care Center, 1175 Third Avenue, in Manhattan. Seton is scheduled to be closed on July 1, 1976, as a result of the anticipated removal of funding by the Agency for Child Development.

I am divorced. At present neither David nor I receive support from David's father or from any other source, other than my salary as a worker at the New York Foundling Hospital. If I am to continue to work and support myself and David, David must have day care. The only alternative to employment for me and day care for David is welfare for both of us.

I have not received any notice from the Agency for Child Development of the offer of any alternative day care facilities for David. To my knowledge no parent at Seton Day Care Center has, or is likely to receive such notice. Seton is one of only seven infant care centers in Manhattan. Five of the seven will be closed as of July 1. Neither of the other two is witin two miles of Seton, and both of the other two are already enrolled at or beyond capacity.

I have been extremely happy with the day care services which David has received at Seton. Seton is a model day care center which uses the Montessori method of pre-school education. To my knowledge Seton has always received excellent evaluations by the Agency for Child Development. I believe that the proposed closing of Seton is both unwarranted and unnecessary. I would like the opportunity to contest the termination of day care services to my child at a "fair hearing" before an impartial administrative officer.

Lynn Ann Tyler

Lynn Ann Tyler

Sworn to before me this 21st

day of June 1976.

Notary Public, State of New York
Qualified in New York County
Commission Expires March 30, 1976

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SUMMONS

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-44)
(Formerly D. C. Form No. 45 Rev. (6-49))

United States District Court

FOR THE

Southern District of New York

CIVIL ACTION FILE NO. _____

Pamela Schneider, Patricia White, Marie Myrtil, Lynn Ann Tyler, on behalf of themselves and their respective minor children and all other similarly situated,

Plaintiff

v.

Betti S. Whaley, individually and as Commissioner of the Agency for Child Development of the City of New York; J. Henry Smith, individually and as Commissioner of the Human Resources Administration of the City of New York; and Philip Toia, individually and as Commissioner of ~~XXXXXXXX~~ the Department of Social Services of the State of New York,

Defendants

SUMMONS

To the above named Defendants :

You are hereby summoned and required to serve upon Pollack & Kaminsky and Litman, Friedman & Kaufman

plaintiff's attorneys , whose addresses are:

Pollack & Kaminsky
61 Broadway
New York, New York 10006

Litman, Friedman & Kaufman
120 Broadway
New York, New York 10005

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____
Clerk of Court.

OFFICE OF CLERK COURT

_____
Deputy Clerk.

Date:

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

COMPLAINT-CLASS ACTION

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their respective minor children and all other similarly situated,

Plaintiffs,

- against -

BETTI S. WHALEY, individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants.

COMPLAINT -- CLASS ACTION

Plaintiffs on their own behalf, on behalf of their minor children, and on behalf of the plaintiff class, as hereinafter defined, through their attorneys, Litman, Friedman & Kaufman, and Pollack & Kaminsky, for their complaint, allege:

Summary of Complaint

1. Plaintiffs are the parents of children who attend day care centers funded under Title XX of the Social Security Act (42 U.S.C. §1397 et seq.).

2. Defendants are the New York State and New York City officials responsible for the administration of day care programs funded under Title XX.

3. Defendants have announced that on July 1, 1976 they will abruptly "defund" 64 day care centers currently receiving federal funding. Such defunding would result in the immediate denial, reduction or termination of day care services currently provided to all members of the plaintiff class.

4. Plaintiffs sue on behalf of themselves and the parents of 3500 children similarly situated who are threatened with the denial, reduction or termination of day care services which would result from the defendants' defunding the day care centers at which their children are enrolled.

5. Plaintiffs seek injunctive relief, as more fully set forth below, on the following grounds:

a) First, Second and Third Counts: The announced denial, reduction and termination of day care services to the parents of children at the defunded centers without prior adequate written notice and without the opportunity for a prior "fair hearing" violates the due process clause of the

Fourteenth Amendment to the United States Constitution and violates applicable federal (42 U.S.C. §1397 et seq.) and state (New York Social Services Law §410 et seq.) statutes and the regulations enacted thereunder (45 C.F.R. 228.14; 205.10; 18 N.Y.C.R.R. 358).

b) Fourth and Fifth Counts: The announced removal of day care services to plaintiffs while such day care services continue to be offered to other eligible persons in the same category and geographic areas as members of the plaintiff class, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and violates federal statutes (42 U.S.C. §1397 et seq.) and regulations (45 C.F.R. 228.25).

c) Sixth Count: The announced defunding of the 64 day care centers violates federal statutes (42 U.S.C. §1397 et seq.) and regulations (45 C.F.R. 228.20 et seq.) requiring a public notice period prior to the proposed amendment of a Comprehensive State Plan which currently calls for the funding of these 64 day care centers.

Facts Common To All Counts:
Plaintiffs

6. Plaintiff Pamela Schneider is the mother of two children, ages three and five attending Chelsea Children's Center, a group day care center funded by defendants at 300 9th Avenue, Manhattan. Schneider is blind and her sole source of income is social security disability benefits.

7. Marie Myrtil is the mother of a four year girl attending Little People's Nursery, a group day care center funded by defendants at 9414 Church Avenue, Brooklyn. Myrtil has recently undergone an operation for thrombophlebitis and is bedridden much of the time. Myrtil's child is mildly emotionally disburbed.

8. Patricia White is the mother of a three year old boy attending Children's Workshop Day Care Center, a group day care center funded by defendants at 199 Victory Boulevard, Staten Island. White is the sole support of her family.

9. "Jane Roe" is the mother of a four year old boy attending Beachbrook Nursery School, a limited purchase of services day care center at 2953 Avenue X, Brooklyn. Beachbrook is the only day care center in a ten mile radius which specializes in working with emotionally disturbed children. Roe's son is severely emotionally disturbed (Roe's true name will be supplied (to court in camera).

10. Lynn Ann Tyler is the mother of a two year old son attending Seton Day Care Center, an infant care center funded by defendants at 1115 Third Avenue, Manhattan. Tyler is employed and is the sole support of herself and her son.

11. All plaintiffs are citizens of the United States and of the City and State of New York.

12. Plaintiffs sue individually, on behalf of their infant children and on behalf of a class consisting of persons who are currently the recipients of day care services provided pursuant to Title XX of the Social Security Act (42 U.S.C. §1397 et seq.) ("Title XX funds"), which services are scheduled to be denied, reduced or terminated on July 1, 1976 as a result of the closing of day care centers at which children are enrolled. (64 day care centers are scheduled to be closed on July 1, 1976. Of this number 4 day care centers have indicated that they intend to close or that their children are adequately provided for elsewhere. Accordingly, the action involves parents and children at 60 day care centers. These centers are listed on Exhibit A.)

Defendants

13. Defendant Philip Toia is the Commissioner of the State Department of Social Services ("D.O.S.S."). Pursuant to the New York Social Services Law, §410, et seq., D.O.S.S. is the state agency which is responsible for administering programs for which federal funds (as well as matching state and local contributions) are made available to New York State under Title XX. Defendant Toia is further responsible, inter alia, for promulgating the Comprehensive Annual Social Services Program Plan for New York State and other reports which are required to be submitted to and approved by the Department of Health, Education and Welfare pursuant to Title XX.

14. Defendant J. Henry Smith is the Commissioner of the Human Resources Administration of the City of New York ("H.R.A."). H.R.A. has been delegated by the State Department of Social Services to administer Title XX funds and programs in New York City.

15. Defendant Betti S. Whaley is the Commissioner of the Agency for Child Development of the City of New York ("A.C.D."). A.C.D. is a division of H.R.A., created by the Mayor of the City of New York by executive order number 38 (1971), to administer the New York City day care program and Title XX funds which are allocated specifically for day care centers.

Jurisdiction

16. Jurisdiction of this Court is based upon 28 U.S.C. §1343 (3) and (4); upon 42 U.S.C. §1983; upon 28 U.S.C. §§1331 and 42 U.S.C. 1397 et seq; and upon the principle of pendent jurisdiction. This action seeks equitable relief and damages, the amount in controversy exceeding $10,000, exclusive of interest and costs.

Class Action Allegations

17. a) The plaintiff class consists of parents of approximately 3,500 children enrolled at day care centers (set forth on Exhibit A) in the five boroughs of New York whose services are scheduled to be denied, reduced or terminated on July 1, 1976; the plaintiff class is so numerous that joinder of its members is impracticable;

b) There are questions of law and fact common to the class, including inter alia: (i) whether the denial, reduction or termination of day care services for class members without notice and without an opportunity for a hearing, violates due process of law and the mandates of federal (45 C.F.R. 228.14) and state (18 N.Y.C.R.R. 358) regulations; (ii) whether the failure to offer day care

services to the plaintiff class, which day care services are offered to other eligible persons in the same category and geographic areas as members of the plaintiff class, violates the rights of the members of the plaintiff class to equal protection under the laws and violates federal regulations (45 C.F.R. 228.25); and (iii) whether termination of day care services at the centers listed on Exhibit A without amending the State Comprehensive Plan filed by New York State with the Department of Health, Education and Welfare violates federal regulations (45 C.F.R. 228.20 et seq.).

c) The claims and defenses of the individual plaintiffs are typical of the claims and defenses of the class.

d) The representative plaintiffs will fairly and adequately represent and protect the interests of the plaintiff class. Each of the representative plaintiffs has a vital interest in the outcome of this action since the action involves continuation of their children in day care, and therefore, the continuation of their ability to earn a livelihood. The attorneys for the class representatives are experienced in civil and constitutional litigation in federal courts.

18. This action is properly maintainable as a class action under Rule 23(b)(2) and (3):

a) The defendants have acted and refused to act on grounds generally applicable to the Class, in that inter alia they have scheduled the imminent closing of the day care centers at which each class member's child is enrolled, and the denial, reduction and termination of day care services for each child, and have refused to grant any class member a fair hearing in connection therewith;

b) Questions of law or fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy: (A) Individual class members have neither an interest nor a capacity to contest the litigation themselves; by definition the class members are poor and unable to afford counsel individually; (B) no other litigation has been commenced by the class concerning the controversy; (C) it is desirable to concentrate claims of class members in one forum because the actions sought to be enjoined are imminent and the prosecution of one lawsuit rather than several would be the most expeditious means of determining the rights of the parties; (D) no difficulties are likely to be encountered in the management of a class action -- the individual plaintiffs are parents of children attending the affected day care centers, and a channel of communication exists between the class representatives and each of the centers.

Statutary Framework

19. Under Title XX of the Social Security Act (42 U.S.C. §1397) federal financial participation at the rate of 75% of a predetermined ceiling amount is made available to all states which provide day care services to children of eligible parents. For the year October 1, 1975 - September 30, 1976, New York State has applied for and received Title XX funds for its day care program servicing some 75,000 eligible families. The state share (25%)

of the cost of the program is borne equally by state and local government. New York City's day care program, which is administered by defendants Smith and Whaley, serves some 45,500 families. Most day care services are provided through the purchase of services from some 400 private non-profit agencies whose sole source of income is Title XX funds.

The Defunding of Plaintiffs' Day Care Centers and its Consequences

20. Each of the day care centers (set forth on Exhibit A) which plaintiffs' children attend is funded in whole or in part under Title XX by defendants, and is dependent for its continued existence upon continuation of Title XX funding.

21. On May 26, 1976, defendants Smith and Whaley announced that, effective July 1, 1976, Title XX funding for each of the centers attended by plaintiffs' children would be withdrawn.

22. Plaintiffs have not received from defendants written notification of the availability or offer of adequate alternative day care services.

23. The imminent defunding of the day care centers attended by plaintiffs' children and the failure of defendants to provide adequate alternative day care services constitute the denial, reduction or termination of day care services to plaintiffs.

24. The announced denial, reduction or termination of day care services by defendants is arbitrary and capricious; ill-advised and based upon misleading, erroneous and incomplete data and the misapplication of defendants' own criteria to the facts.

25. The plaintiffs and members of the plaintiff class have no adequate remedy of law.

26. Unless the Court grants the preliminary and permanent injunctive and delcaratory relief sought herein, plaintiffs and members of the plaintiff class will be irreparably injured because parents would be forced to leave their jobs and apply for welfare; parents already on welfare who are actively seeking employment would be forced to abandon their efforts; parents attending school would be forced to leave school; the minor children of plaintiffs and members of the plaintiff class will be irreparably injured because they would be deprived of vital educational, social and phychological benefits; and both plaintiffs and members of the plaintiff class and their minor children will be irreparably injured because the day care centers at which the children are enrolled will be forced to vacate their premises and lay-off their staffs, and otherwise take steps inconsistent with their continued operation. Unless injunctive relief is granted, even if plaintiffs should eventually prevail on the merits, the closed day care centers will be unable to reopen.

First Count

(Failure to provide a "fair hearing" violates due process)

27. Defendants have failed and refused to provide plaintiffs with:

a) timely and adequate notice of and the reasons for the proposed denial, reduction or termination of day care services;

b) notice of a right to a "fair hearing" to contest the proposed denial, reduction or termination of day care services;

c) the opportunity at a "fair hearing" to defend against the proposed denial, reduction or termination of day care services by confronting adverse witnesses and presenting evidence and arguments orally; and

d) the maintenance of day care services pending the outcome of such "fair hearing";

all as provided by the Supreme Court of the United States in Goldberg v. Kelly, 397 U.S. 254 (1970).

28. Despite the absence of notice, many members of the plaintiff class have demanded fair hearings, which demands have been ignored by defendants.

29. The denial, reduction or termination by defendants of day care services to plaintiffs and members of the plaintiff class caused by the closing of the day care centers set forth on Exhibit A as of July 1, 1976, without first having complied with the "fair hearing" requirements of Goldberg v. Kelly, supra, with respect to notice, an opportunity to be heard and maintenance of services pending a hearing, violates the rights of plaintiff and the plaintiff class to due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Second Count

(Failure to provide a "fair hearing" violates 42 U.S.C. §1397 et seq.)

30. The denial, reduction or termination by the defendants of day care services to plaintiffs and members of

plaintiff class caused by the closing of the day care centers set forth on Exhibit A as of July 1, 1976, without first having complied with the "fair hearing" requirements of Goldberg v. Kelly, as set forth in paragraph 27, supra, (which paragraph is incorporated herein), with respect to notice, an opportunity to be heard and maintenance of services pending a hearing violates 42 U.S.C. §1397 et seq., and the Rules and Regulations of H.E.W. promulgated thereunder, in particular 45 C.F.R. 228.14 and 205.10.

Third Count

(Failure to provide a "fair hearing" violates New York Social Services Law)

31. The denial, reduction or termination by the defendants of day care services to plaintiffs and members of the plaintiff class caused by the closing of the day care centers set forth on Exhibit A as of July 1, 1976, without first having complied with the "fair hearing" requirements of Goldberg v. Kelly, set forth in paragraph 27 supra, (which paragraph is incorporated by reference herein) violates the New York Social Services Law, §410 et seq. and the regulations of the New York Department of Social Services promulgated thereunder, in particular 18 N.Y.C.R.R. 358.

Fourth Count

(Selective failure to offer day care services violates equal protection)

32. The failure by defendants as of July 1, 1976 to offer day care services to plaintiffs and members of the plaintiff class, while continuing to offer such services to other individuals in the same category and the same geographic area will deny plaintiffs and members of the plaintiff

class equal protection under the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Fifth Count

(Selective failure to offer day care services violates 42 U.S.C. §1397 et seq.)

33. The failure by defendants as of July 1, 1976 to offer day care services to plaintiffs and members of the plaintiff class, while continuing to offer such services to other individuals in the same category and the same geographic area violates 42 U.S.C. §1397 et seq., and Rules and Regulations of H.E.W., promulgated thereunder (45 C.F.R. 228.25).

Sixth Count

(Denial of public hearing violates 42 U.S.C. §1397 et seq.)

34. Under Title XX, states seeking federal financial participation were required to file as a condition with the Department of Health, Education and Welfare a Comprehensive Annual Social Services Program Plan for the period October 1, 1975 - September 30, 1976. (Comprehensive State Plan).

35. As required, the Comprehensive State Plan for New York sets forth in detail New York's proposed day care program and lists, inter alia, each of the centers set forth on Exhibit A which defendants now propose to defund.

36. Under Title XX and federal regulations promulgated thereunder, a state may not deviate from, but must follow, its Comprehensive State Plan, unless it amends the Plan, also in accordance with the regulations.

37. Defendants have not sought to amend the Comprehensive State Plan for the period ending September 30, 1976, but rather have chosen to ignore and violate the said plan by failing and refusing to offer day care services at the day care centers listed on the Plan which include each of the centers at which plaintiffs' children are enrolled.

38. The announced closing of the day care centers set forth on Exhibit A violates 42 U.S.C. §1397 and regulations of H.E.W. promulgated pursuant thereto (45 C.F.R. 228.20 et seq.) in that as the defendants failed to comply with the Comprehensive State Plan and failed to seek to amend such plan following an obligatory public notice and comment period.

Seventh Count

(Damages)

39. The closing of day care centers listed on Exhibit A will damage plaintiffs and members of the plaintiff class, in that, inter alia plaintiffs and members of the plaintiff class will be required to leave their places of employment or abandon their efforts to seek employment or education to care for their infant children currently enrolled in those centers or, to hire private day care services.

40. The closing of the day care centers will damage each plaintiff and member of the plaintiff class in an amount in excess of $10,000.

WHEREFORE, plaintiffs on their own behalf, on behalf of their minor children and on behalf of members of the plaintiff class demand judgment, in their favor and against defendants as follows:

1. With respect to the First, Second and Third Counts of the Complaint, temporarily, preliminarily and permanently restraining and enjoining defendants from denying, reducing or terminating day care services to plaintiffs and members of the plaintiff class by defunding the day care centers set forth on Exhibit A, until and unless defendants comply with the "fair hearing" and notice requirements, the Due Process clause of the United States Constitution, Goldberg v. Kelly, supra, and federal and state statutes and regulations, set forth hereinabove;

2. With respect to the Fourth and Fifth Counts of the Complaint, temporarily, preliminarily and permanently restraining and enjoining defendants from failing to offer day care services to plaintiffs and members of the plaintiff class while continuing to offer such services to other individuals in the same category and the same geographic area;

3. With respect to the Sixth Count of the Complaint, temporarily, preliminarily and permanently restraining and enjoining defendants

from terminating funding for the day care centers set forth on Exhibit A and on the Comprehensive Annual Social Services Program Plan for New York State until and unless defendants comply with federal statutory and regulatory requirements for the amendment of said Plan;

4. With respect to the Seventh Count of the Complaint, awarding each plaintiff and member of the plaintiff class damages in an amount no less than ten thousand dollars ($10,000);

5. Granting plaintiffs reasonable attorneys' fees, their costs, disbursements and expenses of this action; and

6. Granting plaintiffs such other and further relief as this Court may deem owing and proper.

New York, New York
June 21, 1976

Yours, etc.,

LITMAN, FRIEDMAN & KAUFMAN

By: _____
Jack T. Litman
420 Broadway
New York, New York 10005
(212) 349-6750

POLLACK & KAMINSKY

By: _____
Richard M. Asche
61 Broadway
New York, New York 10006
(212) 952-0330

Attorneys for Plaintiffs

Exhibit A - LIST OF GROUP DAY CARE CENTERS

Group Day Care Centers

Mollie Perlbinder
1440 Bryant Ave.
Bronx, N.Y. 10459

Ours
335 E. 167th Street
Bronx, N.Y. 10459

El Coqui
413-420 E. 167th St.
Bronx, N.Y. 10451

Melrose Reformed
748 Elton Ave.
Bronx, N.Y. 10451

Alianza Civica Tropical
910 E. 172nd Street
Bronx, N.Y. 10460

East Bronx
1052 Washington Ave.
Bronx, N.Y. 10457

Mother's Self-Help
279 E. 162nd St.
Bronx, N.Y. 10452

Bronx Comm. College
2205 Sedgewick Ave.
Bronx, N.Y. 10468

SERA
1771 Andrews Ave.
Bronx, N.Y. 10453

Red Hook CCC
120 W. 9th St.
Brooklyn, N.Y. 11231

Colony House
420 Baltic St.
Brooklyn, New York 11217

Park Slope CCC
50 Seventh Ave
Brooklyn, N.Y. 11215

Dr. King Memorial
860 Willoughby Ave.
Brooklyn, N.Y. 11221

C.O.N.T.A.C.
139 Amboy Street
Brooklyn, N.Y. 11212

Escuela Infatil
1448 St. John's Place
Brooklyn, N.Y.11213

Church of God in Christ
476 Kosciusko Street
Brooklyn, N.Y. 11221

Harriet Tubman DCC
578 Van Siclen Ave.
Brooklyn, N.Y. 11207

Cherub Haven DCC
47 McKeever Place
Brooklyn, N.Y. 11225

Hegeman DCC
461 Montauk Ave.
Brooklyn, N.Y. 11208

Ohel Sara
771 Crown Street
Brooklyn, N.Y. 11213

Little People's
9414 Church Ave.
Brooklyn, New York 11212

First Step
2860 W. 23rd Street
Brooklyn, N.Y. 11224

Playgroup
407 Remsen Ave.
Brooklyn, N.Y. 11212

Children's DCC
524 W. 42nd Street
New York, N.Y. 10036

Puertorriqueños Hispanos
153 W. 100th Street
New York, N.Y. 10025

Children's Welcome
331 E. 6th Street
New York, N.Y. 10003

Children's Underground
264 W. 87th Street
New York, N.Y. 10024

Chelsea Children Center
300 9th Avenue
New York, N.Y. 10001

JBG Infant Care
201 W. 93rd Street
New York, N.Y. 10025

Lower E. Side Lrng. Ctr.
270 E. 2nd Street
New York, N.Y. 10009

Discovery Rms. for Children
459 W. 152nd Street
New York, N.Y. 10032

Tafts Tiny Tots
1723 Madison Avenue
New York, N.Y. 10029

Countee Cullen
1889 Amsterdam Ave.
New York, N.Y. 10032

Operation Rescue
244 W. 149th Street
New York, N.Y. 10039

Mable Lane
34 W. 118th Street
New York, N.Y. 10026

City College
133rd Street & Convent Ave.
New York, N.Y. 10031

St. Paul's
461 W. 166th Street
New York, N.Y. 10032

Riverside Infant Care
490 Riverside Dr.
New York, N.Y. 10031

Allen Community
111-54 Merrick Blvd.
Jamaica, N.Y. 11433

Jaima & Alberta Wise Memorial
195-05 Linden Blvd.
St. Albans, N.Y. 11412

Resurrection DCC
100-17 32nd Avenue
East Elmhurst, N.Y. 11412

Children's Workshop
177 Victory Blvd.
Staten Island, N.Y. 10301

Family Day Care Services

John D. Marshall FDC
2894 Richmond Terrace
Staten Island, N.Y. 10303

Lorillard Child Ctr.
4725 Park Avenue
Bronx, N.Y. 10458

United Bronx Parents
810 E. 152nd Street
Bronx, N.Y. 10455

Children of Light
235 Rodgers Ave.
Brooklyn, N.Y. 11225

Citadel of Hope
543 Lenox Avenue
New York, N.Y. 10037

Limited Purchase of Services Centers

Cinnamon Tree Day Care Center
55 21 Mosholu
Bronx, New York

Beachbrook Nursery School
2953 Avenue X
Brooklyn, New York 11235

Richmond Early Learning Center
159 Broadway
Staten Island, New York 10310

Rochdale Village Nursery
170 30th Avenue
Jamaica, Queens 11434

Marble Hill Nursery School
5470 Broadway
Bronx, New York 10463

Action Nursery
1019 46th Street
Brooklyn, New York 11219

Other
Friendship Day Care Center
2260 Crotona Ave.
Bronx, New York 10457

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NOTICE OF CROSS MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

PAMELA SCHNEIDER, et al.,

Plaintiffs,

-against-

BETTI S. WHALEY, et al.,

Defendants.

----------x

NOTICE OF CROSS-MOTION TO DISMISS

76 CIV 2715
(GLG)

Motion by: Municipal Defendants

Date, Time and Place Returnable: June 25, 1976, at 10:30 a.m. in the United States Courthouse, Foley Square, New York, N.Y., before the Honorable John M. Cannella, United States District Judge.

Relief Requested: An order denying application for a preliminary injunction and dismissing the complaint pursuant to Rule 12 and 6(b) of the Federal Rules of Civil Procedure on the ground that it fails to state a cause of action and for such other and further relief as to this Court may seem just and proper.

Supporting Papers: Affidavit of and Exhibits.

Dated: June 24, 1976

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
566-2183/2192

By: Rosemary Carroll
ROSEMARY CARROLL
Assistant Corporation Counsel

76

TO: Clerk of the Court

Litman, Friedman
& Kaufman
120 Broadway
New York, New York 10005

Pollack & Kaminsky
61 Broadway
New York, New York 10006
952-0330

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ADDIDAVIT OF STEPHEN TAMKE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAMELA SCHNEIDER, et al.,	:	76 CIV. 2715 (GLG)
Plaintiffs,	:	AFFIDAVIT IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS
v.	:	
BETTI S. WHALEY, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
~~CITY OF NEW YORK~~) ss. :
COUNTY OF NEW YORK)

STEPHEN TAMKE, being duly sworn, deposes and says:

1. I am the assistant to the Interim Executive Director of the Agency for Child Development of the City of New York (hereinafter, "ACD"), and having personal knowledge of the facts set forth hereinafter, submit this affidavit in opposition to plaintiffs' application for a preliminary injunction and in support of defendants' cross-motion to dismiss the complaint.

2. I have been employed by ACD in this capacity since April 1, 1976, and the range of my duties include assisting the Interim Executive Director in implementing management systems, contract formation for ACD and fiscal monitoring. During the course of my employment, I have worked closely with other staff members in the effort to formulate a realistic day care program commensurate with the fiscal constraints imposed upon ACD, as on all other city agencies, by the fiscal crisis.

3. The ACD is a division of the Human Resources Administration created by mayoral order to administer day care services in New York City.

4. The program budget for ACD from all sources was approximately 165 million in July 1, 1975. However, due to the fiscal crisis affecting all levels of government in the City of New York, that budget

was reduced to $1.57 million mid-fiscal year. Because of this reduction in available funds, 28 day care centers were closed on or about January 1976. Those closings were upheld, despite challenges on equal protection and due process grounds, by the Appellate Division, Second Department in Our Children's Day Care Center v. Whalev (N.Y.L.J., May 5, 1976, p. 2, col. 3). ACD discontinued funding for 500 family counselors effective July 1, 1976.

5. The New York City Expense Budget, 1976-77, identifies a further reduction of funds available to ACD for a program budget of $126.2 million, or a 16% deficit between present cost and available funds. (Annexed hereto is Exhibit A—"Attachment A—ACD Program Budget—Comparative Fiscal Condition.")

6. Since this budget includes $10 million that day care centers must raise through independent activities, ACD is, in reality, only able to expend $116.2 million for day care in FY 1976-77 or 22.5% less than what is needed to operate. This will require a mandatory individual day care center contribution of 8-10% of its 1976-77 budget. It is hoped that the availability of funding for food-related expenses form the U. S. Department of Agriculture will make up most of this contribution.

7. Pursuant to Title XX of the Social Security Act, the Federal Government will reimburse 75% of the expenditures of the City of New York for all Title XX Programs up to a maximum of $150 million. New York State reimburses 12 1/2% of New York City expenses during fiscal year 75-76, day care services have been allotted 60.9% of the entire Title XX Budget for the City although the persons serviced constitute only 2% of the Title XX-eligible population. Thus, under the comprehensive New York Plan 40,000 children are serviced. Clearly Federal funds do not cover 75% of all day care services because of the $150 million ceiling. In many instances the City has been providing day care services where no reimbursement from the Federal or State funds were provided.

8. Because of the unrelenting reality of the fiscal crisis,

New York City can no longer continue to provide services without assuring reimbursement by Federal and State funding in all instances. Thus, after evaluating every feasible alternative ACD has concluded that there is only one way to comply with the fiscal constraints imposed by the Mayor and the Emergency Financial Control Board. Forty-nine day care programs and seven mini-family day care programs shall be defunded and fifteen day care centers shall be partially defunded on July 1, 1976.

9. On or about June 1, 1976, notices of intended closings were sent to each day care center scheduled for termination. Meetings were held between ACD staff and sponsoring boards of defunded programs for the express purpose of explaining the reasons for defunding and the implementation of criteria used in making such determination. Additionally, ACD stands ready to meet with any such sponsoring boards desiring information concerning defunding. (Exhibit B and B1 are listings of day care cneter meetings held.)

10. Parents of children attending centers scheduled for defunding were also sent notices of the proposed closing and requested to indicate acceptance or declination of alternative placement (Exhibit C are form notices). This notification process in presently continuing until all parents have received notices.

11. The decision to take the action outlined above was made only after thorough analysis of the entire ACD budget indicated that defunding of day care centers was unavoidable. As part of this analysis, ACD completed an exhaustive study of day care centers utilizing City funding in the following manner:

(1) The total savings to be achieved (plus ancillary closings costs and allowance for savings achieved elsewhere) was identified, and apportioned to each of ACD's seven service areas on the basis of present service levels and percentage of total ACD caseload serviced by each area.

(2) A series of budget meetings was conducted by ACD staff; Executives; Field Office Directors, and support personnel; Program staff, Facilities and Budget staff to review the operations of group day care centers in each service area.

Prior to these meetings exhaustive profiles of all ACD-funded programs had been prepared, and additional information was continually requested. By the end of this process, a large amount of information had been collected, and a body of candidates for defunding in each service area was assembled.

(3) After these meetings were concluded, the data was assembled in the form of worksheets, grouped by borough, and evaluated against uniform criteria including: utilization, per capita cost, facility quality, fiscal and board management, availability of alternative services, program quality, and the likelihood of continuing fixed costs. To the extent possible, the availability of alternative services was an a priori consideration. A few examples of how those criteria other than alternative services led to defunding decisions are as follows:

(a) Centers with low utilization (below 75% of capacity) were principal candidates for defunding, due to an inability to maintain sufficient eligible attendance to secure maximum state and federal reimbursement.

(b) Centers located in sub-standard facilities were also identified for possible defunding. A sub-standard facility was defined as one which would have difficulty maintaining licensed status without problematic costs, or one in which the building was deteriorating.

(c) Centers which were not cost-effective, due either to small size or high per capita cost, were identified for possible defunding.

(4) Top-level ACD staff met about one week prior to the public announcement, at which time ACD made its final recommendations concerning which centers would be defunded effective July 1st. The material gathered above was evaluated on the basis of the best information available, and adjusted, to the extent possible, to reflect shifting population patterns.

(5) HRA Administrator J. Henry Smith, based upon these final recommendations, authorized and directed the implementation of the defunding of 49 Group Day Care Centers, and the contraction of services in a number of others. As part of this process, the Mayor's office was briefed concerning these procedures and accepted them.

12. A review of the listing of centers slated for defunding indicated that the utilization rates for the first eight months of the present fiscal year were much less than full capacity (in several centers utilization was less than half capacity), the number

of children involved was too small to be cost efficient and/or the per capita cost per child per week exceeded $65, the maximum amount which the state will reimburse the city for the provision of day care services. Annexed hereto as Exhibit C-1 the listing of all defunded centers with capacity utilization and cost calculations.

13. Illustrative of this point is the cost of infant care service, which for every defunded center exceeded the limit of state reimbursement, and, in the instance of JBG Infant care exceeded state reimbursement limits by $35 per child per week. Additionally, in every instance these centers were under-utilized. (See Exhibit C-1 p. 7).

14. The New York State Department of Social Services, the state entity responsible for administering Title XX day care funds in New York State was notified by ACD of the uniform application of these criteria to all centers slated for defunding. Annexed hereto as Exhibit D is the letter setting forth selection criteria prepared by J. Henry Smith, Administrator Commissioner, Human Resources Administration.

15. We have determined that utilization of agency-wide vacancies, attrition rates of day care participants through the course of the summer, expected levels of eligibility certifications, and access to family day care resources will enable ACD to maintain its present provision of day care services. ACD has made no decision to discontinue, suspend or reduce the services to any child who has been

receiving such services. On the contrary, ACD is offering transfers to children at other facilities. While we recognize the interest of a parent in maintaining day care in the same center, we must in this time of fiscal stress assert that the recipient of day care services does not have a right to receive services at a particular facility. We are not required under Federal or state law to provide hearings for defunding of programs. Where there is a decision on an individual basis that a recipient is no longer entitled to day care services because of ineligibility, a hearing is required . Here, however, no plaintiffs have been determined to be ineligible for continued day care services. Rather the provision of these services will be maintained in other programs. (See Exhibit C-2, List of Receiving Day Care Programs.)

16. The provision of alternative day care services will be achieved through implementation of a placement-priority system. The order of priority will be:

(i) child welfare cases, that is, children who have been determined to have been neglected by their parents; (ii) children of currently employed parents; (iii) children of parents taking part in approved training programs and currently employed; (iv) all children of non self-sufficient parents (either because of illness, incapacity, or necessary absences for part of the day), and (v) children of parents seeking employment.

Annexed hereto as Exhibit E is the memorandum of June 2, 1976, for placement procedures of children in defunded centers/programs; Exhibit E is the memo of June 11, 1976, specifying the transfer of priority categories. In this

regard, families determined to be ineligible following hearing, or who have received notices of intent to discontinue accompanied by State disapproval of continuous day care service will not be involved in the placement effort.

17. To effect good faith placements, the ACD in reviewing available sites will accord geographic considerations the highest priority and every attempt will be made to transfer children to available vacancies in group and family day care programs considering accessibility to the child's home or the parents' place of business.

18. Implementation of this process will result in the placement by June 30, 1976 of 72% (2381) of children served in programs to be defunded. Alternative placements shall be effected for all remaining children by August 31, 1976. The attrition rate for the 40,000 children in service is expected to average 30% or over 13,000 children (25% due to graduation, the remainder due to ancillary causes).

19. Children who cannot be placed immediately will be given priority for placement over new applicants for day care services.

20. The defunding of these forty-nine centers and the other reductions referred to above will allow the ACD to effect greater utilization of facilities, and reduce per capita cost, thereby decreasing the deficit between State reimbursement and city cost and provide equivalent service at the present level of enrollment. To crystalize the point:

For the fiscal year 1975-76, only 56 centers out of a total of 390 were below the $65 state reimbursement limit. After the defunding of these 49 day care centers

and other fiscal reductions, ACD will reduce the average per capita cost to $63 a week per child, so that 216 centers will be in compliance with state requirements. (Annexed hereto as Exhibit F is a tentative projection of Per Capita Costs - Fiscal Year 1976-77 for Day Care Centers, ACD).

21. We do not close these centers without the gravest concern regarding the future of day care in the City of New York. We implement these cuts under the most severe pressure recognizing that the eyes of the State Emergency Financial Control Board and of Secretary of Treasury Simon are ever vigilant for any sign of "slippage" from the austere budget constraints that have been imposed upon the City of New York. The tenor of that surveillance and the aid which can probably be expected from the State is indicated by the letter of Stephen Berger (annexed hereto as Exhibit "G"). To ameliorate the effect of these cuts we have sought assistance from the state in securing for New York City its rightful share of social service dollars, and in addition, have carefullyreviewed the alternate proposals of the Ad Hoc Coalition for alternative economies in the day care budget for 1976-77. (annexed hereto as Exhibit H is the review of said report prepared for the Mayor by Administrator Smith). On the direct lease question, we have given our complete support to the ongoing investigation of these leasing arrangements and will make all relevant ACD records available for scrutiny. A statement of ACD policy with respect to the entire question of the defunding of ACD day care centers is set forth in the letter

of Betti S. Whaley, Commissioner, and Lew Frankfort, Executive Interim Director, dated June 14, 1976 to the Senate Minority Task Force on child care (annexed hereto as Exhibit I).

22 . In conclusion, it is the considered judgment of the professional staff at ACD that the defunding of the 49 day care programs is the only realistic alternative available if compliance with the fiscal reductions imposed upontthe agency are to be effected. It is beyond cavil that the delicate fiscal balance achieved by this defunding program cannot withstand any delay and that postponement of these reductions will inevitably result in the closing of greater number of centers at a later date and a more severe disruption of services.

WHEREFORE defendants respectfully request an order denying the plaintiffs' application for a preliminary injunction and dismissing the complaint and for such other and further relief as to this Court may seem just and proper.

/s/

Stephen Tamke

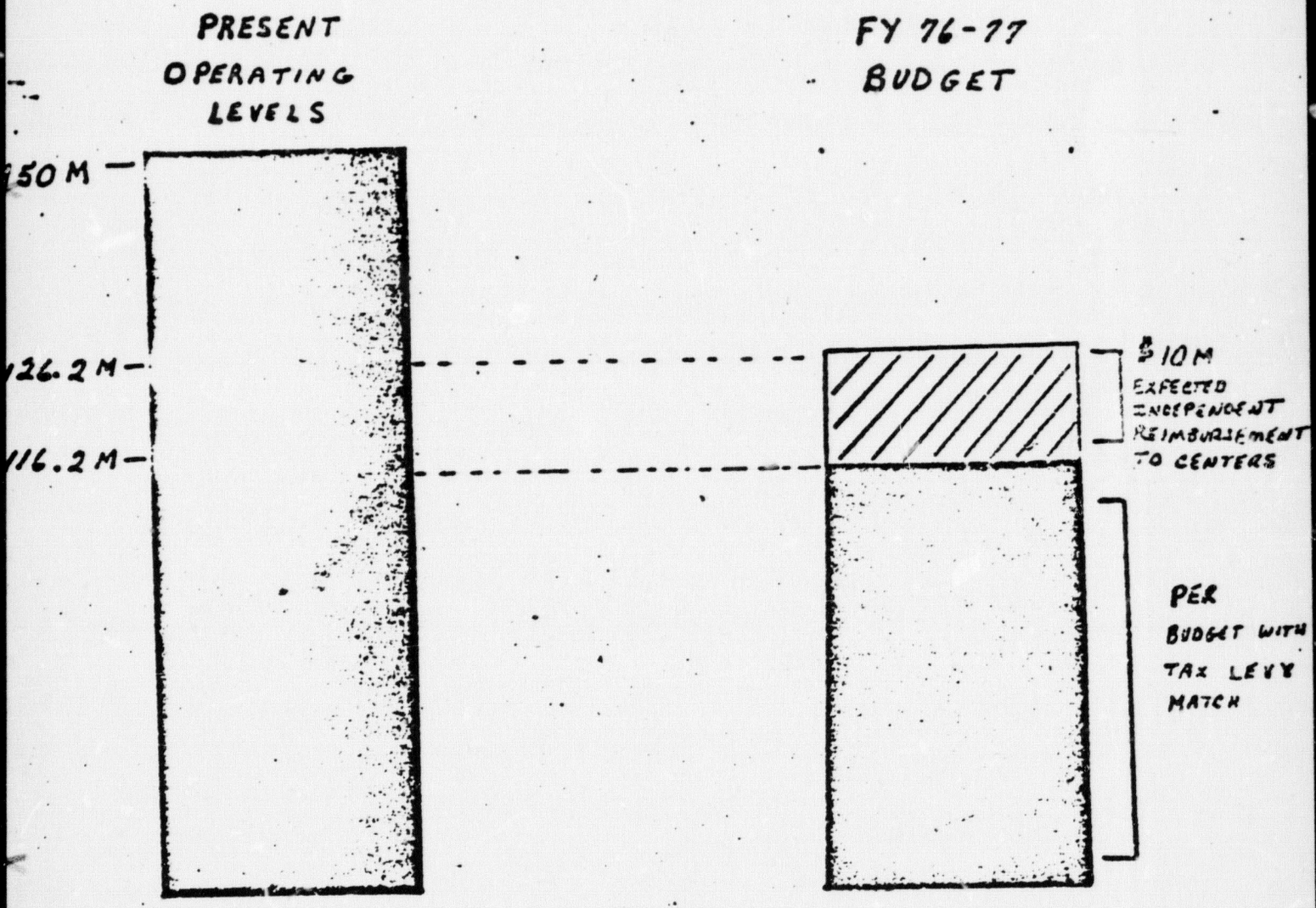
Sworn to before me this
25th day of June, 1976

Joseph F. Bruno
Notary Public
Reg No. 5497591
Term Ex. 3/30/78
Qual. in Kings County

EXHIBIT A - ACB PROGRAM BUDGET-COMPARATIVE FISCAL CONDITION

ACD PROGRAM BUDGET

COMPARATIVE FISCAL CONDITION



DIFFERENCE — - $23.8 Million

- 16%

Exhibit "A"

5/76

II. ACD FISCAL PLAN
FISCAL YEAR 1976-77

- FY 76-77 PROGRAM BUDGET NEEDED TO MAINTAIN PRESENT OPERATING LEVELS: ——→ $150 Million

- LESS: PLANNED REDUCTIONS:

A. SPECIFIC ECONOMIES (NOT INCLUDING PROGRAM DEFUNDINGS/CONTRACTIONS):

1.	Reductions in Staffing Patterns	$ 7.1 Million
2.	Reductions in Line Items	3.0
3.	Elimination of Line Items	.9
4.	Expected Audit Savings	.5
		$11.5 Million

B. SAVINGS ACHIEVED THROUGH DAY CARE CENTER DEFUNDINGS AND PROGRAM CONTRACTIONS/ELIMINATIONS — $ 9.9[1] Million

C. ADDITIONAL ~~FUNDS~~ Economies REQUIRED — $ 2.4 Million

- SCHEDULED IN FY 1976-77 ACD PROGRAM BUDGET (INCLUDING PROVISION FOR $10M INDEPENDENT REIMBURSEMENT TO DAY CARE CENTERS:) ——→ $126.2 Million

[1]NET OF 10% CLOSING COSTS AND 8% SAVINGS ACHIEVED ELSEWHERE

5/76

BEST COPY AVAILABLE

DAY CARE CENTER DEFUNDINGS AND PROGRAM CONTRACTIONS/ELIMINATIONS

		#	ANNUAL SAVINGS[1]
I.	GROUP DAY CARE PROGRAMS		
	A. TOTAL DEFUNDING	49	$ 7.80 Million
	B. PARTIAL DEFUNDINGS		
	1. Eliminate School Age Prog.	7	.42
	2. Eliminate Infant Prog.	3	.31
	3. Reduction in Capacity	5	.38
II.	ELIMINATION OF LIMITED PURCHASE OF SERVICE AGREEMENTS	7	.56
III.	ELIMINATION OF ACD FUNDING TO MINI-FAMILY DAY CARE PROGRAMS	7	.50
	TOTAL SAVINGS.....		$9.0M

[1]NET OF 10% CLOSINGS COSTS, AND 8% SAVINGS ACHIEVED ELSEWHERE

BOROUGH SUMMARY
DAY CARE CENTER DEFUNDING

BOROUGH	PRESENT # CENTERS	DEFUNDED CENTERS	# CTRS. AFTER DEFUNDING	% REDUCTION
BRONX	73	10	63	13.7%
BROOKLYN	154	17	137	11.0"
MANHATTAN	116	18	98	15.5"
QUEENS	40	3	37	7.5"
STATEN ISLAND	8	1	7	12.5"
TOTAL	391	49	342	12.5%

Exhibit B
Listing of Day Care Center Meetings Held

DATE	NAME OF DCC	FISCAL #	R. A. #	MEETING CHAIRED BY BW	LF	AJ	SH	REMARKS
2/76	Beachbrook Nursery	488	5	X				
3/76	Wise Memorial	267	9		X			
4/76	Lower East Side Learning	517	6		X			
	Parent Preparation	326	7		X			
7/76	Jewish Board of Guardian Infant Care Unit	385	6	X				
	Operation Rescue	189	7				X	
	United Bronx Parents 1	224	1	X				
8/76	Riverside Church DCC	402	7	X				
	Friendship	044	1				X	
9/76	Dr. King Memorial	021	4	X				
	First Step	354	5				X	

[redacted]

EXHIBIT "B"

MEETINGS HELD WITH DEFUNDED PROGRAMS

DATE	NAME OF DCC	FISCAL #	R. A. #	MEETING CHAIRED BY BW	LF	AJ	SH	REMARKS
/76	Little People's	161	5		X			
	Playgroup	360	5		X			
/76	Riverdale	508	2			X		
	Cinnamon Tree	451	2			X		
	SERA	476	2		X			
	Church of All Nations	022	6		X			
/76	NAACP Montauk						X	
	Ohel Sarah	445	4	X				
4/76	Resurrection	115	8	X				
5/76	Children's DCC	140	6		X			
6/76	Children's Welcome	272	6				X	

MEETING CHAIRED BY 92

DATE	NAME OF DCC	FISCAL #	R. A. #	BW	LF	AJ	SH	REMARKS
/17/76	Alianza	369	1		X			
/21/76	Children's Underground	321	6				X	

Exhibit B1
Listing of Day Care Center
Meetings Held

93

DATE	NAME OF DCC	FISCAL #	R. A. #	MEETING CHAIRED BY BW	LF	AJ	SH	REMARKS
/76	Little People's	161	5					
	Playgroup	360	5					
/76	Riverdale	508	2			X		
	Cinnamon Tree	451	2			XX		
	SERA	476	2					
	Church of All Nations	022	6					
/76	NAACP Montauk							
	Ohel Sarah	445	4	X				
/76								
	Resurrection	115	8	X				

[redacted] EXHIBIT B-1

MEETING CHAIRED BY 94

DATE	NAME OF DCC	FISCAL #	R. A. #	BW	LF	AJ	SH	REMARKS
/76	~~Hamilton Madison DCC~~	~~049~~	~~6~~	~~X~~				
	Beachbrook Nursery	488	5	X				
/76	Wise Memorial	267	9					
/76	Lower East Side Learning	517	6					
	Parent Preparation	326	7					
/76	Jewish Board of Guardian Infant Care Unit	385	6	X				
	Operation Rescue	189	7					
	United Bronx Parents 1	224	1	X				
/76	Riverside Church DCC	402	7	X				
	Friendship	044	1					
/76	Dr. King Memorial	021	4	X				
	First Step	354	5					

EXHIBIT C
FORM LETTER NOTICES

FOR USE WITH LETTERS 1, 5, OR 7.

95

The City of New York

AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

Re: Change of Day Care Service
For

Dear

We regret to inform you that, due to the severe reduction in the day care budget for the fiscal year 1976/77, the Agency for Child Development must discontinue funding the Day Care Center, effective July 1, 1976.

It is the policy of the Agency to provide service, where possible, as long as eligibility and need for care exists. A review of our records indicates:

☐ You are currently eligible for day care services.

☐ You have been found ineligible for day care services, but have been approved for continued service pending the outcome of a Fair Hearing.

☐ You are ineligible for day care services because you are currently enrolled in a four-year college program, but have not been terminated from service pending the outcome of Ayers v. Whaley.

Therefore, arrangements have been made with the Day Care Center, located at to receive your son/daughter . The center will reserve a place for him/her until 1976. If you decide to enroll your child at this center, please contact Mr./Ms. , Center Director, at by , 1976 to make an appointment for an interview.

Mr./Ms. of Resource Area will assist you with any problem you may have regarding this transfer of service.

Sincerely,

Director
Resource Area

EXHIBIT "C"

AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

96

Re: Change of Day Care Service
For

Dear

We regret to inform you that, due to the severe reduction in the day care budget for the fiscal year 1976/77, the Agency for Child Development must discontinue funding the Day Care Center, effective July 1, 1976.

It is the policy of the Agency for Child Development to provide service, where possible, as long as eligibility and need for day care exists. A review of our records indicates that you are currently eligible for day care services. Arrangements have therefore been made with the Day Care Center at to receive your son/daughter . This center will reserve a place for him/her until 1976. If you decide to enroll your child in this center, please contact Mr. Ms. , Center Director, at by 1976, to make an appointment for an interview.

Mr./Ms. of Resource Area will assist you with any problem you may have regarding this transfer of service.

Sincerely,

Director, Resource Area

Letter #2

97

The City of New York

AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

Re: Change of Day Care Service
for

Dear

We regret to inform you that, due to the severe reduction in the day care budget for the fiscal year 1976/77, the Agency for Child Development must discontinue funding the Day Care Center effective July 1, 1976.

It is the policy of the Agency for Child Development to provide service, where possible, as long as eligibility and need for care exist.

A review of our records indicates that your eligibility for service expires . An eligibility redetermination must therefore be completed.

If you are found to be eligible for continued service, arrangements will be made to transfer your son/daughter to another ACD-funded day care center.

An appointment has been made for you with at on June at am/pm. For this determination, it will be necessary for you to bring the following items:

If you cannot keep this appointment, please contact at before .

We realize that the defunding of your present center may create a hardship for you and your family. However, every effort will be made to place each eligible child in service as near as possible to his/her current center.

Sincerely,

Director, Resource Area

Letter # 5

98

The City of New York

AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

Re: Determination of Day Care
Eligibility for

Dear

Based on the information provided by you on 1976, we have determined that you are eligible for continued day care service. Arrangements have been made with the Day Care Center at to receive your son/daughter . This center will reserve a place for him/her until 1976. If you decide to enroll your child in this center, please contact Mr./Ms. Director, at by 1976, to make an appointment to visit the center.

Mr./Ms. of Resource Area will assist you with any problems you should have. He/she can be reached at .

Thank you for your cooperation during this difficult period.

Sincerely,

Director, Resource Area

W-SEA

The City of New York

AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

Letter

99

RE: Change of Day Care Service
For

Dear

Based on the information provided by you on it was determined that you are ineligible for continued day care services. We have been informed by the New York State Fair Hearing Office, however, that you have been approved to continue receiving day care services pending the outcome of your fair hearing.

Therefore, pending final disposition of your case, arrangements have been made with the to receive your Son/Daughter Day Care Center at . This Center will reserve a place for him/her until , 1976. Please contact Mr./Ms. , Center Director, at by , 1976, to make an appointment for an interview.

Mr./Ms. of Resource Area will assist you with any problem you should have.

Sincerely,

Director, Resource Area

Letter# 6

100

The City of New York

AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

RE: Day Care Center Closing

Dear

We regret to inform you that, due to severe reductions in the day care budget for the fiscal year 1976/77, the Agency for Child Development must discontinue funding the Day Care Center, effective July 1, 1976.

A review of our records indicates that on , 1976, you were found to be ineligible for day care services under Title XX regulations, and services were terminated pending the outcome of your fair hearing.

If the New York State Fair Hearing Office determines that you are eligible for day care, please contact Mr./Ms. at Resource Area , telephone number , for placement of your child in another ACD-funded program.

Sincerely,

Director, Resource Area

R.A.P. - I&II

WEEK 115

BRONX

Code		Name of Recv. Center/Progra
510	1.	STEVEN SALES
518	2.	TREMONT CROTONA
84	3.	TREMONT MONTEREY
323	4.	TRINITY DCC
116	5.	TWIN PARKS DCC
224	6.	UNITED BRONX PARENTS I
102	7.	UNIVERSITY HTS.
113	8.	WASHINGTON DCC
902	9.	LOWIS Point
915	10.	YOUTH VILLAGE
920	11.	BRONX ACTION/COMP.
180	12.	FEATHERBED LANE
105	13.	EAST TREMONT CC DEV.
101	14.	VICTORY DCC
513	15.	BRONX DALE
941	16.	FRIENDSHIP DCC
312	17.	EAST BRONX NAACP
219	18.	SOUND DALE
417	19.	CONCOURSE DCC
025	20.	WEBSTER
502	21.	BETANCES
261	22.	SEVEN CORNERS
092	23.	CASTLE HILL
	24.	
	25.	Williamsbridge NHSP
		TOTAL
		Total (p. 1 and 2)

BEST COPY AVAILABLE

116

R.A.# 3 WEEK EN

RA/FILE #	NAME OF RECV. CENTER/PROGRAM
263	1. ED HOCK COMMUNITY CENTER
418	2. ROUND TABLE
484	3. HELEN OWEN CAROL
383	4. LITTLE BO-PEEP
436	5. OUR LADY OF PEACE
447	6. YOUNG MINDS
479	7. BETHEL BAPTIST CHURCH
347	8. NEHNS
515	9. JULES & MICHAELS
654	10. BETHESDA
465	11. WONDERLAND
	12.
	13.
	14.
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	25.
	TOTAL

RA #

Children's Services Council

RA/FIC#	NAME OF RECV. CENTER/PROGRAM	TR.
336	1. GRACE PRE-SCHOOL	
496	2. FIVE BLOCK	
495	3. WILLO-HAVEN	
308	4. HAITIAN INNER.	
	5. JOHNE BRUCE	
	6.	
	7.	
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	25.	
	TOTAL	

Dr. Fixé
Bedford Corps.

RA/FISC#	NAME OF RECV. CENTER/PROGRAM
14200	1. Association of Black Social Wks
04382	2. New Movement
04015	3. Mary Mcleod Bethune
04464	4. Equadilla
04019	5. Sumner
04103	6. MARCY
04020	7. Tompkins
	8.
	9.
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	25.
	TOTAL

R.A4 Hogeman Cocic 119

#	NAME OF RECV. CENTER/PROGRAM	BUD INF.
1.	PUBMAN	
2.	[illegible] WC STAND	
3.	LOUIS PINK	
4.	K.N. NAACP	
5.	Cypress Community	
6.	United Youth Action #1	
7.	United Youth Action #2	
8.	Sylvia Klein	
9.	Hawthorne Robert Index	
10.	New Lots Family Center	
11.		
12.		
13.		
14.		
15.		
16.		
17.		
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24.		
25.		
	TOTAL	91

R.A.F.

DICKMAN

(CIL + TUBMAN)

120

RACE	NAME OF RECV. CENTER/PROGRAM	BUDGET
469	1. IDA C. ALSTON	
511	2. COMMUNITY SPONSORS	51
317	3. BEDFORD AVE.	
480	4. CHILDRENS WORLD	
182	5 DAUGHTERS OF AFRICAN DESCENT	
205	6. LESSIE FREEMAN	
249	7. FUTURE	
	8.	
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	24.	
	25.	
	TOTAL	51

R.A. # 4 WEEK ENDING

Defunded Agencies Overcoming Contact 7/5

121

FIX #	NAME OF RECV. CENTER/PROGRAM	SUB INF.
	1. Brownsville Salvation Army.	
	2. Sigma	
	3. Faith Hope & Charity	
	4. Advent	
	5. Brownsville	
	6. Allen Hill Plummer Plaza	
	7. Pacific Community	35
	8.	
	9.	
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	11.	
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	24.	
V	25.	
	TOTAL	

R.A. # 11 WEEK ENDING 1/22 #3

Refundal Center → (From ESQUELA)

RA/FIS #	NAME OF RECV. CENTER/PROGRAM	BUDGET INF	FS
	1. Friends of Crown Heights	20	95
	2. True Light Herald		95
	3. St. John's		55
	4.		
	5.		
	6.		
	7.		
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	24.		
	25.		
	TOTAL		20

R.A. # ✓ WEEK ENDING 123

RQ/FIX	NAME OF RECV. CENTER/PROGRAM	BUS INF
✓ 08✓	1. BROOKLYN REC'RHS.	
✓ 169	2. CAREY GARDENS	
✓ 004	3. CONEY ISLAND CH. CARE	
✓ 491	4. CONEY IS. COMM. COUNCIL	
✓ 31✓	5. EAST BKLYN	
✓ 276	6. JOHN F. KENNEDY	
✓ 316	7. FLATBUSH ACTION	
✓ 134	8. ROBERTA BRIGHT	
✓ 4✓0	9. ROBERTO CLEMENTE	
4	10. ONE STOP	
✓ 19✓	11. COLLEGE COLLECTIVE	
	12.	
	13.	
	14.	
	15.	
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	21.	
	22.	
	23.	
	24.	
	25.	
	TOTAL	

R.A 6 WEEK END 124

CA/FIC #	NAME OF RECV. CENTER/PROGRAM	C IN
06466	1. AGUADILLA EN ZORINQUEN	
06471	2. ASSOCIATION	
06142	3. CH. MEETING	
06521	4. COALITION HUMANHSIN	
06303	5. E 3 St. SA	
06032	6. EDUC. ALLIANCE	
06155	7. EMMANUEL	
06314	8. 1st AVE SA	
06049	9. HAMILTON MADISON	
06050	10. HENRY ST P.S.	
06052	11. HUDSON GUILD	
06099	12. LEAGUE CHILDC	
06143	13. LIBERATION NURSERY	
06424	14. LILLIAN WALD	
06470	15. LOOKUP	
06070	16. MOB, FOR YOUTH	
06291	17. UNITED ORG SOFFOLK ST	
06104	18. VIRGINIA DAY NURSERY	
06016	19. GRAND ST. P.S.	
	20.	
	21. WINDHAM F.D.C.	
	22.	
	23.	
	24.	
	25.	
	TOTAL	

Cont'd →

RAP

WEEK ENDING

125

RA/FISH	NAME OF RECV. CENTER/PROGRAM	BUD INF
06045	1. Goddard Riverside PS	
06038	2. Eisman Day Nursery	
06914	3. CDI Fam. Day Care	
06142	4. Ch. Mansion	
06047	5. Grosvenor	
06076	6. Open Door	
06509	7. Unidad	
06280	8. Great Northern	
06114	9. W. 80 St. P.S.	
06255	10. W 83 St. P.S.	
06015	11. W.S.CA D.C.C.	
06119	12. Mabel B. Fitzgerald	
06913	13. Clinton F. D.C.	
06258	14. W.S.CA Youth	
06023	15. Greenwich House	
06117	16. St. Matthew St. Timothy	
06309	17. Oliver St S.A.	
06191	18. Hester St. S.A.	
	19.	
	20.	
	21.	
	22.	
	23.	
	24.	
	25.	
	TOTAL	

RAM 6/11/76 126

RA/FIS#	NAME OF RECV. CENTER/PROGRAM	BU INF
07394	1. Area 145	
07135	2. ABSW	
07358	3. Grace Temple	
07409	4. CHAMA	SPIC
07188	5. Champs Morningside	10
07023	6. Citizens Care	
07035	7. East Harlem Block 2	
07513	8. East Harlem Triangle	
07068	9. East River	
07260	10. First Spanish	
07065	11. Grant	
07048	12. Hamilton Grange	
07051	13. Hope Day	
07494	14. James Varick	
07062	15. LaGuardia	
07066	16. Manhattanville	
07011	17. Mary Walton	
07060	18. Monticello	
07072	19. Mt. Calvary	
07033	20. East Calvary	
07029	21. Mt. Morris	
07074	22. Neighborhood	
07158	23. Pequenos Souls	
07163	24. Pleasant Avenue	
07081	25. Prince Hall	
	TOTAL	20
	* July 1 Vacancies	

Cont'd →

R.A. # 7 WEEK 127

RA/FISH#	NAME OF RECV. CENTER/PROG:
07306	1. Puerto Rican Guidance
07320	2. Quo Vadis
07373	3. RENA
07245	4. Riverside Child
07087	5. Sheltering Arms
07503	6. UFBCO
07097	7. Union Carver
07098	8. Union Washington
07131	9. Upper Manhattan
07100	10. Utopia
07359	11. Washington Heights
	12. Haryou-Act FDC
07071	13. Morningside Child
07054	14. Inwood
07434	15. Mt. Washington
07352	16. La Hermosa
	17.
	18.
	19.
	20.
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	22.
	23.
	24.
	25.
	TOTAL

RA/FISH	NAME OF RECV. CENTER/PROGRAM
	1. ASTORIA CC
	2. BETTER COMMUNITY
	3. EAST ELMHURST
	4. FRANK C. ALESSI
	5. MALCOLM X
	6. NORTH QUEENS
	7. WESTERN QUEENS
	8. QUEENSBRIDGE
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	24.
	25.
	TOTAL
	GRAND TOTALS

Cont'd →

QUEENS WEEK EN:

129

BA/AISC#	NAME OF RECV. CENTER/PROGRAM	T
	1. BLANCHE	
	2. EVANGELICAL	
	3. CHARLES DREW	
	4. LAURELTON SPRINGFIELD	
	5. JAMAICA MONTAUK	
	6. MERRICK "Y"	
	7. AMISTAD	
	8. STARLIGHT	
	9. JAMAICA LINDEN	
	10. SO. EAST QUEENS	
	11. SHELDON WEAVER	
	12. Edgemere Redfern	
	13. HAMMEL AIRUERNÉ	
	14. SPRINGFIELD GARDENS	
	15. JAMAICA DAY	
	16. ORIGINALS	
	17.	
	18.	
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	20.	
	21.	
	22.	
	23.	
	24.	
	25.	
	TOTAL	

EXHIBIT D - LETTER FROM HUMAN RESOURCES ADMINISTRATION TO NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

131

The City of New York

HUMAN RESOURCES ADMINISTRATION
250 CHURCH STREET, NEW YORK, N.Y. 10013

J. HENRY SMITH *Administrator/Commissioner*

Mr. Philip L. Toia
Executive Deputy Commissioner
New York State Department of
Social Services
1450 Western Avenue
Albany, New York 12243

Dear Commissioner Toia:

We would like to bring you up to date regarding the circumstances surrounding the recent defunding of 49 Day Care Centers by the Agency for Child Development (ACD).

It is important to emphasize that the defunding of day care centers was undertaken only after ACD had explored a range of alternatives to achieve the savings necessitated by a fiscal year 1976-77 operating budget $24 Million (or 16%) below that needed to continue services at present levels. These savings included reductions in staffing patterns, reductions and elimination of many line items in Center budgets, and savings in expenditures for Center audits. While significant efforts to renegotiate all direct leases and find a legal basis to cancel some are now beginning, it may be some time before the day care budget realizes relief from this burden. Consequently, we are unable to budget a savings for this hoped for eventuality. We have, however, budgeted $700,000 less for vacant (and soon to be vacant) direct leased facilities in anticipation of some of these properties being utilized for reimbursable non-day care use.

After all of these economies had been identified, there remained a total savings to be achieved of $12.3 Million (See Attachment A). With only $9.9 Million (net of 10% closing costs and 8% savings achieved elsewhere) accomplished through defundings, additional funds must be made available from other sources to obtain a balanced day care budget for FY 1976-77.

As the necessity for these defundings became apparent, ACD undertook an exhaustive analysis of City-funded Centers, in which the total needed savings was apportioned among ACD's seven service areas, and modified

EXHIBIT D

as possible on the basis of present service levels and changing population patterns. Next, ACD staff conducted a series of budget meetings for each service area to review the operations and costs of centers in each area, based upon exhaustive profiles of all ACD-funded programs. This data was then transferred to worksheets, and preliminary evaluations were made on the basis of uniform criteria outlined below. Finally, top ACD staff, headed by Commissioner Whaley and Interim Executive Director Frankfort, convened about one week prior to the public announcement to prepare ACD's final recommendations for defunding. Based upon these recommendations, I authorized and directed the implementation of the defunding of 49 centers, along with the contraction of services in a number of others.

As stated above, the decisions were made on the basis of uniform criteria. Following is a brief outline of the criteria utilized:

1. Fiscal Crisis: All defundings took place under the constraints of ACD's drastically reduced operating budget for fiscal year 1976-77. This criterion was the underlying factor in all decisions.

2. Low Utilization: Centers whose utilization was low (below 75% of budgeted capacity) were principal candidates for defunding, due to an expected inability of these centers to maintain sufficient eligible attendance/enrollment to secure maximum state and federal reimbursement. In many cases, low utilization is an indication of an over-saturation of programs in a given area.

3. High Per Capita Cost: Centers which were not cost-effective, due either to small size or high per capita cost, were identified for possible defunding, due to the existing State-mandated reimbursement ceiling of $65/week/child. Another important consideration was the extremely limited funds available, and the consequent need for the most effective utilization of these funds.

4. Facility Problem: Centers located in substandard facilities were also identified for possible defunding. A substandard facility was defined as one which would have difficulty maintaining licensed status without prohibitive costs, or one in which the building was deteriorating.

5. Alternate Service Available Nearby: An important consideration in the selection of Centers for defunding was the availability of alternative services for displaced children within a reasonable distance of their homes or current centers, where possible.

6. On Going Fixed Costs: The reality of direct lease costs continuing after a center was defunded, at least for the short-run, was another consideration. We were aware that the rent and real estate taxes associated with a direct lease facility would continue entirely as a tax levy expense chargeable to the day care budget. As a consequence, while the presence of these costs did not insure a decision against defunding (witness the selection of 10 direct lease sites), ACD was sensitive to this factor in making its recommendations for defunding.

In addition, ACD considered other factors, such as Sponsoring Board problems, fiscal management, and program quality. However, these considerations played a secondary role in decision-making, except when unusual circumstances dictated otherwise.

In some cases, centers were defunded on the basis of one of the first five criteria if alternative services were available. Other centers were defunded on the basis of an interaction of these five criteria modified by consideration of on going fixed costs and the ancillary factors mentioned above. It is important to note that these criteria were not ranked, and that a poor rating in any one category did not necessarily result in a decision to defund any center.

I trust that the procedure explained above will attest to the reasoned manner in which these extremely difficult defunding decisions were made.

Sincerely,

J. Henry Smith
Administrator/Commissioner

CEDURES FOR CHILDREN IN DEFUNDED CENTERS/PROGRAMS

134

The City of New York
AGENCY FOR CHILD DEVELOPMENT
HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

ATTACHMENT C

TO: Resource Area Directors, Social Service Consultants

FROM: James W. Nathaniel, Director of Field Operations

DATE: June 2, 1976

SUBJECT: PLACEMENT PROCEDURES FOR CHILDREN IN DEFUNDED CENTERS/PROGRAMS

The attached procedures detail the steps to be taken by Social Service Consultants in coordinating the transfer of eligible children in defunded centers/programs to service in other ACD-funded programs. It is essential that these children be placed in service as quickly as possible.

The following letters (Attached) will be used in this placement effort:

#1 - Currently Eligible: Children to be Transferred

#2 - Eligibility Lapsed: Redetermination to be Scheduled

#3 - Redetermination Completed: Family Eligible

#4 - Redetermination Completed: Not Eligible (Use Standard "Notice of Intent to Discontinue Day Care - Not Attached)

#5 - Fair Hearing Granted, Approved for continued service

#6 - Ineligible per 3/31 Recertification, Fair Hearing Requested, continous service denied.

#7 - Ineligible per 3/31 Recertification: Fair Hearing Requested, Continous service approved; or 4-yr. college student pending court case,

In addition, we are requesting that three reports be submitted to Mr. James Nathaniel on a weekly basis.

EXHIBIT "E"

1. REPORT ON PLACEMENT STATUS

- For each defunded center/program, enter the name, identification number, and potential receiving center for each child currently in service. As each step of the transfer process is completed, enter the date of the action in the appropriate column. Also, attach to the report a copy of letters sent to each child listed.

2. RECAP OF PLACEMENT STATUS

- Enter the name of each affected center/program in your resource area, along with the fiscal number.

In the"Initial Active Enrollment" section (#1), enter the number of children in each category who must be placed in alternate service whose eligibility has not yet lapsed.

As recertifications are completed and it is determined that families are still eligible for service, enter the number in the "Additional Active Enrollment" section (#2).

As children are placed, enter the number in the "Placed this Week" section (#4).In following weeks, transfer this number to the "Placed Previously" section (#3).

Compute the "Not Yet Placed" column by subtracting from the sum of the "Initial Active Enrollment" and the "Additional Active Enrollment" sections, the total of "Placed this Week" and "Placed Previously" sections. Please utilize the following formula as indicated in column headings: 1 + 2-3-4.

3. RECAP OF AVAILABLE VACANCIES

- Enter the name, fiscal number and budgeted capacity of each program in your resource area which has been designated as an "Alternate Service" for children from defunded programs.

- Compute the "Maximum Enrollment" for each program compnent by multiplying budgeted capacity by 1.1.

- Enter "Current Enrollment" figures for each program, in section 3.

- As children are placed, enter the numbers in section 4.

- Compute "Total Slots Available" by subtracting from "Maximum Enrollment" the total of sections 3 & 4, and enter in the appropriate section.

These reports are to be submitted each Friday to Mr. Nathaniel. It is suggested that resource area directors deliver them when they report to 240 Church Street for their weekly meetings.

Social Service Consultants

Tasks	Deadlines
1. Identify centers in the vicinity of closing centers which have enrollment rates of 110% or less and identify avaliable vacancies.*	Friday, May 28
2. Review files of closing centers. On basis of DSS 2560, DSS 2561 and ACD-1, separate active cases from closed cases. Group active cases by: a. families who are currently eligible. b. families whose eligibility expires in May or June. c. families who were ineligible as of March 31 but who are either four-year college students covered by the Ayers vs. Whaley court case or who were approved by HYS Fair Hearing Office to remain in service pending the outcome of their fair hearing. Store closed cases at Resource Area.	Tuesday, June 1
3. Identify specific vacancies for all active eligible children in centers nearest their homes.	Wednesday, June 2
4. Prepare and send Letter #1 to currently eligible families.	Thursday, June 3
5. Prepare and send Letter #2 to families whose eligibility expires in May or June, stating that redetermination is required.	Thursday, June 3
6. Prepare and send Letter #6 to families ineligible as of March 31 whose children are still in service.	Thursday, June 3
7. Prepare and send Letter #5 to families ineligible as of March 31 whose children were not approved to remain in service.	Thursday, June 3
8. Redetermine eligibility of families whose eligibility expires in May or June. If family is ineligible for service, prepare and give to the family the ACD"Notice of Intent to Discontinue Day Care"at the time of redetermination.	Tuesday, June 15
9. If family is found ineligible and does not request a fair hearing, the child is to be dropped from service as of June 30.	———
10. If family requests fair hearing and the hearing is completed by June 25: a. ineligibles will be dropped as of June 30. b. prepare and send Letter #2 to eligibles, and commence transfer of child.	——— Friday, June 25
11. If family requests fair hearing and Fair Hearing Office approves child to remain in service pending the outcome of the hearing, prepare and send Letter #4 and commence transfer of child.	Friday, June 25
12. If family requests fair hearing and Fair Hearing Office does not approve continuation of service to the child pending the outcome of the hearing, prepare and send Letter #5. Child to be dropped from service as of June 30.	Friday, June 25
13. For parents who have requested interviews with receiving centers (i.e. who have agreed to transfer their child to the designated center), pick up child's	(on-going)

*NOTE: High Attrition Expected During Summer Months.

Tasks	Deadlines
records from closing center and hand deliver them to the receiving center by the date of the interview.	
14. For parents who have not contacted the receiving center on the deadline date, contact the family to verify the decision to withdraw the child from service. Make provisions to grant extensions in extenuating circumstances.	(on-going)
15. Pick up any remaining social service records from defunded centers.	Monday-Wednesday, June 28-30.

NEW FUND # 10	FISCAL NO	NAME of RECEIVING CENTER
10	305	Child Power
10	090	Edwin Markham
10	328	New MORNING
10	091	PORT RICHMOND
10	494	RICHMOND EARLY LEARNING
10	462	Whitney YOUNG
10		SEAMAN'S Home (VOLUNTARY Family Day Care)

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Upon check will be completed by Ms. Temple (see from memo of IV-A unit) will be weekly [illegible] effective June 21 (Friday)

6/76

#1 - WEEKLY REPORT ON STATUS OF PLACEMENT — DEFUNDED DCC's/PROGRAMS

WEEK ENDING _____ RA/TSCM# _____ DCC NAME _____

CHILD NAME	TRIG TAPE (1-INF 2-PS 3-SA 4-FDC)	CASE #	Potential Rcv. Center Name	Rcv. #	← PRESENT ELIGIBILITY STATUS → a. Current b. Elig Elapsed: Several Letters (A1) Sent (Date)	Schld Final Date	Results of Recert: Elig — Referral Letter (A3) Sent (Date)	Inelig — Ineligible Letter Sent (Date)	c. Ineligible: Improved Performance Referral Letter (A6) Sent (Date)	Not Approved for Service — Letter (A5) Sent (Date)	Following Mo. Rcv. Center (Date)	Enrolled in Recv. Center (Date)	NOT ENROLLED (EXPLAIN)	Child Unreferred (✓)	File Transferred (✓)
1.															
2.															
3.															
4.															
5.															
6.															
7.															
8.															
9.															
10.															
TOTAL															

R.A. 9 / 2#

WEEK ENDING _____.

6/76

#2 - WEEKLY RECAP OF PLACEMENT STATUS - DEFUNDED CENTERS/PROGRAMS

A/F & #	NAME OF DEFUNDED PROGRAM	(1) INITIAL ACTIVE ENROLLMENT				(2) NBL. ACTIVE ENROLLMENT				(3) PLACED PREVIOUSLY				(4) PLACED THIS WEEK				(1+2-3-4) NOT YET PLACED			
		INF	PS	SA	FDC	INF	PS	SA	FDC	INF	PS	SA	FDC	INF	PS	SA	FDC	INF	PS	SA	FDC
	1.																				
	2.																				
	3.																				
	4.																				
	5.																				
	6.																				
	7.																				
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	9.																				
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	11.																				
	12.																				
	13.																				
	14.																				
	15.																				
	16.																				
	17.																				
	18.																				
	19.																				
	20.																				
	TOTAL																				

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6/76

R.A.# _____ WEEK ENDING _____.

#3 - WEEKLY RECAP OF AVAILABLE VACANCIES IN RECV. CENTERS/PROGRAMS

RA/FISH	Name of Recv. Center/Program	(1) Budgeted Capacity				(2) Max Enrollment (110% Cap)				(3) Current Enrollment				(4) Children Placed				(2-3-4) Total Slots Available			
		INF	PS	SA	FDC	INF	SA	PS	FDC	INF	SA	PS	FDC	INF	PS (Date)	SA	FDC	INF	PS	SA	FDC
	1.																				
	2.																				
	3.																				
	4.																				
	5																				
	6.																				
	7																				
	8.																				
	9.																				
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	18.																				
	19.																				
	20.																				
	21																				
	22																				
	23.																				
	24.																				
	25.																				
	TOTAL																				

EXHIBIT E1 - MEMORANDUM RE: TRANSFER OF CHILDREN PRIORITY CATEGORIES

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The City of New York

AGENCY FOR CHILD DEVELOPMENT

HUMAN RESOURCES ADMINISTRATION

240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

TO: Resource Area Directors
Social Service Staff

FROM: James W. Nathaniel
Director of Field Operations

DATE: June 11, 1976

SUBJECT: TRANSFER OF CHILDREN PRIORITY CATEGORIES

The following priorities should be adhered to regarding the transfer of children from our defunded programs:

1. Approved Child Welfare Cases

   A. To provide protective service
   B. To provide preventive service
   C. To prevent foster care
   D. To prevent institutional care

2. Self Support

   A. Employment -
      Children of working parents

3. Vocational Training or Rehabilitation

   Review to determine if care is needed during summer or placement until September.

4. Self Sufficiency

   A. Illness
   B. Incapacity
   C. Necessary absence for part of the day

5. Seeking Employment

   Review cases in relation to 120 day cut-off period.

EXHIBIT E-1

Children should be identified for placement by available vacancies. The day care center will have the responsibility of making the appropriate age group shifts.

ACD's Educational Consultants should be available to provide technical assistance to the Boards in reference to age groupings in the programs.

/rsd

FISCAL YEAR 1976/77

EXHIBIT F - TENTATIVE PROJECTION OF PER CAPITA COSTS

The attached charts are based upon draft budgets for fiscal year 1976/77. These budgets have just been completed and thus have not been thoroughly reviewed for accuracy. Consequently, the per capita costs must be considered tentative.

These charts include per capita data for pre-school and school-age children only. Infants will be considered in a separate listing to be prepared.

The following is a summary of the charts:

I. Per Capita Costs of Day Care Centers

	TOTAL		DIRECT LEASE		INDIRECT LEASE	
	No.	%	No.	%	No.	%
Under 65	217	63%	73	21%	144	42%
Over 65	126	37%	87	25%	39	11%
	343		160	47%	183	53%

II. Potential tax levy overage with no dispensation from New York State Department of Social Services

Direct Lease:	$3,534,000
Indirect Lease:	$ 328,000
	$3,862,000

III. Comparative Analysis of Day Care Centers Under $65

	#	%
1974-75	21	5%
1975-76	56	14%
1976-77	217	63%

IV. Average Estimated Per Capita Cost For Fiscal Year 1976/77

Personnel	$44.00
Occupancy	$12.00 ($6 indirect, $19 direct)
Pension & Ins.	$ 4.00
All Other	$ 3.00
	$63.00

V. Reasons for Per Capita Cost over $65

1. Old center, nigh personnel costs
2. Old center, high pension costs
3. Inefficient capacity (20-45)
4. High occupancy cost

EXHIBIT "F"

EXHIBIT G
LETTER FROM STEPHEN BERGER

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State of New York
Emergency Financial Control Board
For the City of New York
270 Broadway
New York, New York 10007
212—488-4294

Chairman
Hugh L. Carey, Governor
Board Members
Arthur Levitt,
Comptroller
Abraham D. Beame,
Mayor, City of New York
Herrison J. Goldin
Comptroller, City of New York
Albert V. Casey
William M. Ellinghaus
David I. Margolis

Stephen Berger
Executive Director

June 14, 1976

Mr. Peter Sauer
Bank Street College of Education
610 West 112th Street
New York, New York 10025

Dear Peter:

Thank you for your recent letter and for sending me the material prepared by the Ad Hoc Committee to Save Our Children.

As a result of my experience as State Commissioner of Social Services, I have a great interest in the City's day care program. Generally, I share some of your observations concerning the direct lease program and the cost of central administration of the program. I would also agree that it would be worthwhile for the City to explore means other than use of tax levy funds to provide day care services. However, we would not be realistic if we did not acknowledge the fact that even if your proposals were fully implemented, there would still be an insufficient amount of savings to allow the day care program to continue at the levels it has in previous years.

Personally, I feel that we cannot continue to look at the day care program in isolation. It must be viewed as a component of a full network of services to families as well as in comparison to the range of day care programs in New York State. New York City receives a limited amount of Federal funds each year under Title XX with which it must provide a broad range of services. Almost 70 percent of the City's allocation has been used for the day care program and that program serves only 2 percent of the eligible population. In addition, the City has historically committed considerable funding over the Federal ceiling to this program. Continuing to allocate funds on the basis of historical funding patterns does not encourage the development of the wider range of protective and preventive services that should be available to families. The focus of serious dis-

EXHIBIT "G"

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cussion as the City plans its future service priorities should be on how the day care program in New York City can be changed from its present focus on costly institutional day care to other types including more extensive use of family day care, and how day care can be made an integral part of a network of social services.

Finally, as I am sure you realize, the Emergency Financial Control Board is charged with the responsibility of monitoring the City's three-year financial plan to insure that the statutory goal of having a balanced budget by FY 1978 is achieved. Decisions which the City makes on what programs it will eliminate, cut back or restructure remain, properly so, in the hands of the City administration.

Sincerely,

Stephen Berger

SB:GE

EXHIBIT G - LETTER FROM J. HENRY SMITH TO MAYOR BEAME

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The City of New York

HUMAN RESOURCES ADMINISTRATION
250 CHURCH STREET, NEW YORK, N.Y. 10013

J. HENRY SMITH *Administrator/Commissioner*

June 17, 1976

Honorable Abraham D. Beame
Mayor
City of New York
City Hall
New York, New York 10007

Dear Mayor Beame:

Last week you requested the Agency for Child Development (ACD) to review a proposal by the Ad Hoc Coalition for alternative economies in the Day Care budget for fiscal year 1976/77. I have just been informed that this proposal presented by the coalition on June 8th has been withdrawn. It is also my understanding that a revised proposal is to be submitted shortly for your consideration.

Commissioner Whaley and Interim Executive Director Frankfort met with the Coalition late last week to discuss the details of this (now withdrawn) proposal. The Coalition proposed that ACD utilize its limited funds to provide day care centers with a sum of money set forth in a written purchase of service agreement, to be utilized with a wide degree of latitude by centers, from whom ACD would in effect "purchase care." Centers under this proposal would have a wide degree of autonomy centers' prime responsibility would be to maintain licensed status, and provide full-day service. They would be free to organize their program as they saw fit, and to effect cost savings as they considered appropriate. Finally, centers would be permitted to raise funds from non-ACD sources without a corresponding reduction in ACD funding. The Coalition proposal would leave a significant shortfall of operating funds for centers: they propose that centers make up this shortfall by identifying and admitting non-Title XX-eligible, full tuition-paying children. (To the extent that families would not be able to pay the full cost of service, centers would find alternative funding to make up the difference). Again, tuition received from tuition-paying families would not reduce the level of ACD funding. This method would replace the present funding mechanism whereby ACD prepares a detailed budget for each center, with specific appropriations for each expense, and within which ACD is the sole source of operating funds for the center.

We believe the original proposal to be unfeasible during the coming fiscal year for a number of reasons outlined as follows:

EXHIBIT "H"

1. Problems In Identifying Tuition Paying Children:

The ability of individual centers to identify tuition paying families must be determined. Since a majority of the neighborhoods serviced by ACD-funded centers are not economically heterogenous, they would not provide a population of families in a financial position to pay full or even partial tuition for day care services. In addition, many of the programs which will have the greatest difficulty in identifying tuition-paying children will also have the most difficulty in securing alternate funding: many of these centers do not have the experience or affiliations to be successful in this process.

This problem will be exacerbated with the implementation (expected July 1st) by the New York State Department of Social Services of the proposed Title XX amendment to raise income ceilings for day care services. The implementation of this amendment will require programs to identify children for tuition whose family incomes are outside the substantially liberalized Title XX income ceilings. This will surely be more difficult.

2. Center Management Problems:

Without substantial technical and management assistance, many of the sponsoring boards of ACD funded centers would not possess the experience and skills necessary to run a completely independent operation as a business. Many of these programs would need to markedly strengthen their administrative infrastructure to develop this capability. For these reasons in particular, we are concerned that a number of centers would be driven out of business if the city were to implement this plan for all programs during the coming fiscal year.

3. Delay in Implementing the 1976/77 Plan:

Even if this plan were feasible, the start-up time would delay implementation until the fall, requiring even greater economies to achieve a balanced budget.

Despite the problems of this (now withdrawn) proposal, we believe that the concepts underlying this plan have significant merit, and ACD is taking steps to provide centers with greater operating flexibility during the next fiscal year. Among these steps are a consolidation of a number of lines in center budgets, with a consequent increase in the latitude with which centers may allocate and expand funds. Further, ACD will not only encourage but mandate the acquisition by centers of outside funding sources. Toward this end, center budgets for 1976/77 will require the acquisition of about ten percent funding from sources other than the City. In addition, we have received authorization from

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the State Department of Social Services for the enrollment of a limited number of private, tuition-paying children at centers which will be able to locate such children. Under this proposal, centers would be allowed to retain all fees paid by these children, and these fees would not of themsleves reduce the amount of ACD funding to these centers.

The concept of Purchase of Service arrangements in which present publicly-funded centers receive only enough monies to fund most of their slots deserves careful consideration. ACD is prepared to work with the coalition in the formation of demonstration models in several programs, if possible. During the course of this project, it will be possible to gather empirical evidence as to the ability of such programs to survive, and the quality and cost of the care provided by each program.

ACD is meeting with the Coalition to discuss the revised proposal, and I will provide you with a review of that proposal when it is received. However, the present time-constraints and fiscal circumstances dictate that we not move away from the 49 center defundings scheduled for July 1st.

As you know, the City is currently working on a number of fronts of day care leases. Landlords of 17 Direct Lease facilities with serious and/or recurring structural defects have been mandated to meet with ACD officials to discuss detailed remedies to these conditions, under penalty of withholding of rent. Where compliance schedules are met, or corrections do not meet specifications, rent will be withheld. This process will be repeated for ten other direct lease sites similarly identified. Secondly, Landauer Associates, a real estate consulting firm, and Patrick Rohan, a real estate lawyer, are reviewing 15 direct leases for misrepresentation of design or construction, and for fair market value relative to costs actually incurred. This study, which will be completed by the end of July, may provide the city with grounds for renegotiation or cancellation of some of these leases. Thirdly, the Mayor's Task Force on Day Care has established an Interagency Direct Lease Renegotiation Panel, consisting of top officials of the Corporation Counsel's office, the Department of Real Estate and the Human Resources Administration, to identify possible bases for renegotiation of leases, and to begin these renegotiations with selected landlords. This panel will begin by dealing with the 17 leases referred to above, and will incorporate the findings of the Landauer/Rohan study in their review. Finally, the Comptroller's office is auditing all direct day care leases. Where significant facility deficiencies resulting in unusable space are identified, rent will be withheld from the respective landlords by the Comptroller's office.

I trust that this information will satisfy your requirements at this time.

Sincerely,

J. Henry Smith

J. Henry Smith
Administrator/Commissioner

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P. S. Commissioner Whaley and Interim Director Frankfort have just concluded a meeting with the Ad Hoc Coalition during which the Coalition orally presented a revised proposal. It seems to be basically the same as the original proposal but it is to be submitted to us shortly for formal review. At this writing, we seriously doubt it could be found acceptable and certainly not in time to avoid terminating the 49 centers required to meet the budget stipulations.

W-2EE

EXHIBIT 1
LETTER FROM ADC TO SENATE MINORITY
TASK FORCE ON CHILD CARE

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The City of New York

AGENCY FOR CHILD DEVELOPMENT

HUMAN RESOURCES ADMINISTRATION
240 CHURCH STREET, NEW YORK, N.Y. 10013

BETTI S. WHALEY
Commissioner

LEW FRANKFORT
Interim Executive Director

June 14, 1976

General Policy

Karen S. Burstein, Chairperson
Senate Minority Task Force on Child Care

Richard Gottfried, Chairperson
Assembly Standing Committee on Child Care
The Senate, State of New York
Albany, New York 12224

Dear Senator Burstein and Assemblyman Gottfried:

We are in receipt of your letter of June 3, 1976 raising questions concerning the recent decision of the Agency for Child Development (ACD) to defund 49 day care centers. The issues raised in the letter are real, and demand a thoughtful reply. We have herein attempted to address these issues.

Firstly, it must be emphasized that the defunding of day care centers was undertaken only with the greatest reluctance, and only after maximum realistic alternative economies were identified. ACD has suffered a series of significant budget reductions during the course of the past year, which saw the Day Care budget shrink from a July 1, 1975 level of about $165 Million, to a mid-year level of $157 Million to a needed $1[illegible]0 Million to maintain present operating levels during the course of the 1976-77 Fiscal Year. In addition to the sharp reductions in the current year, the 1976-77 Expense Budget identifies a further reduction of $24 Million (to a level of $126.2 Million), thus leaving an operating budget 16% short of that needed to continue the level of services currently provided. (See Attachment A).

Since this budget includes $10 Million that day care centers must raise through independent activities, ACD is, in reality, only able to expend $116.2 Million for day care in FY 1976-77 or 22.5% less than what is needed to operate. This will require a mandatory individual Day Care Center contribution of 8-10% of its 1976-77 Budget. It is hoped that the availability of funding for food-related expenses from the U.S. Department of Agriculture will make up most of this contribution.

EXHIBIT "I"

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It was in the context of this dismal budgetary situation, and also of the current situation of New York City regarding the ceiling on Title XX expenditures, that these budget reductions were imposed upon ACD. Another point which must be borne in mind is that, even after these severe contractions, the 1976-77 ACD program budget will not be in balance: $2.4 Million of additional funds are needed.

Thus, the decision to defund certain centers was forced upon ACD by the most stringent budgetary constraints in its short history. Within these constraints, ACD explored a range of alternatives to achieve the necessary savings and carried out every viable accross-the-board budget reduction prior to the defunding of any center.

After it became apparent that the defunding of certain Day Care Centers would be unavoidable, ACD undertook an exhaustive, rigorous analysis of Day Care Centers utilizing City funds, in the following manner:

(1) The total savings to be achieved (plus ancillary closings costs and allowance for savings achieved elsewhere) was identified, and apportioned to each of ACD's seven service areas on the basis of present service levels and percentage of total ACD caseload serviced by each area.

(2) A series of budget meetings was conducted by ACD staff, including ourselves, Field Office Directors and support personnel, Program staff, Facilities and Budget staff to review the operations of group day care centers in each service area. Prior to these meetings exhaustive profiles of all ACD-funded programs had been prepared, and additional information was continually requested. By the end of this process, a large amount of information had been collected, and a body of candidates for defunding in each service area was assembled.

(3) After these meetings were concluded, the data was assembled in the form of worksheets, grouped by borough, and evaluated against uniform criteria including: utilization, per capita cost, facility quality, fiscal and board management, availability of alternative services, program quality, and the likelihood of continuing fixed costs. (See Attachment B). To the extent possible, the availability of alternative services was an <u>a priori</u> consideration. A few examples of how those criteria other than alternative services led to defunding decisions are as follows:

(a) Centers with low utilization (below 75% of capacity) were principal candidates for defunding, due to an inability to maintain sufficient eligible attendance to secure maximum state and federal reimbursement.

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(b) Centers located in sub-standard facilities were also identified for possible defunding. A substandard facility was defined as one which would have difficulty maintaining licensed status without problematic costs, or one in which the building was deteriorating.

(c) Centers which were not cost-effective, due either to small size or high per capita cost, were identified for possible defunding.

Some centers were defunded on the basis of one of these criteria if alternative services were available. Other centers were defunded on the basis of an interaction of some or all of these criteria.

(4) Top-level ACD staff, ~~ourselves included~~, met about one week prior to the public announcement, at which time ACD made its final recommendations concerning which centers would be defunded effective July 1st. The material gathered above was evaluated on the basis of the best information available, and adjusted, to the extent possible, to reflect shifting population patterns.

(5) HRA Administrator J. Henry Smith, based upon these final recommendations, authorized and directed the implementation of the defunding of 49 Group Day Care Centers, and the contraction of services in a number of others. As part of this process, the Mayor's office was briefed concerning these procedures and accepted them.

Let us next address some of the other specific concerns you have identified:

1. Re: your point (b): Unfortunately, time constraints and other pressures did not allow ACD the ability to consult with centers during the budgetary process. We did, however, utilize the knowledge and experience possessed by Field Office and Program staff, as well as the center profiles referred to above.

2. Re: your point (c): As noted above, prior to the decision to defund certain centers, ACD removed every item which could safely be taken from an on-going child care program. These reductions have themselves severely damaged the remaining programs. Further across-the-board reductions would produce programs below even the most minimal standards of child care, and would threaten licensability with a possible consequent loss of reimbursement.

3. Re: your point (d): ACD is currently meeting with Sponsoring Boards of defunded programs, for the purpose of more fully explaining the criteria used and the reasons for the actions taken. We remain available to meet with any Board which requests a discussion of these decisions with us.

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4. Re: your point (e): We must emphasize again the very important consideration given to placement prospects for children in defunded centers. Alternative services were identified, where possible, for each center prior to a defunding decision.

5. Re: your points (f.g.): ACD has compiled detailed procedures for the placement of eligible children currently serviced by defunded programs, and has instituted a weekly reporting mechanism to appraise our offices of the progress of this placement effort. (See Attachment C for detailed information on these procedures). Field offices have been alerted to be aware of the high attrition experienced by day care centers during the summer months, as pre-school children graduate from care. Each Field Office has established a liaison to interface with parents and centers to assure the placement of all eligible children at centers reasonably close to those they are currently attending. ACD is hopeful of placing 75% of these children in alternate service by June 30th and, offering placement to the remainder by August 31st. To date, ACD has identified about 2,000 placement openings available by June 30th, or about 65% of the approximately 3,200 children dislocated due to these actions.

The procedures outlined above created a rational mechanism and structure for the implementation of these very painful budget reductions. The process of retrenching valuable services is extremely difficult, yet the City's fiscal difficulties require that it be confronted realistically. ACD has attempted to do this.

With regard to the second group of questions, the attached listing (Attachment D) provides most of the information requested. A few items, however, have not been included, for the reasons stated below:

1. Re: your question (c): Budgeted Amount: allocations for heat and light have been combined under the heading "Utilities"; allocations for repairs and maintenance have been grouped as "Renovations."

2. Re: your question (d): Amount Paid: is not listed separately, as the current 75-76 center budgets were re-calculated only weeks ago based upon expenditures through March, and expenditures should run extremely close to budgeted amounts.

3. Re: your question (g): Utilization: is defined as the number of available care days, divided by actual eligible child attendance days, and is provided on the basis of cumulative data from July, 1975 through February, 1976.

4. Re: your question (h): Waiting Lists: many parents place each of their children on waiting lists for more than one center; in addition, many centers do not determine a child's eligibility for service prior to placement on a waiting list; finally, the requirement for eligibility re-determination of all children on waiting lists every 30 days is often not followed. For these reasons, the size of waiting

lists for centers is misleading, and we have not utilized this information in our response.

Finally, it must be emphasized that no part of central administrative costs is attributable to individual center budgets. The entire amount of these costs is borne in the Administrative Budget (running at approximately $5 Million for Fiscal 1975-76) which is separate from the operating (program) budget. That part of an individual center's budget labeled "Central Costs" simply identifies those items which are paid centrally by ACD from the program budget rather than by the center itself (e.g., pensions, Direct Lease rent, certain insurance items).

With reference to the projected number of children in day care at ACD-funded centers in September, 1976, we hope to maintain our present approximate enrollment of about 40,000 children. ACD will mandate that centers enroll at 110% of capacity to insure maximum attendance and, thus, maximum State reimbursement. As for September, 1977, it is impossible to project, given the uncertainties of even the present year's budget.

ACD is hoping to expand its use of "limited purchase of service" (LPOS) agreements, and will restore terminated agreements on a priority basis as early as funds become available. Perhaps more importantly in the short run, however, ACD is reviewing its recent decision to defund seven LPOS centers, with a view toward making some adjustments, if possible. ACD is not opposed to centers' obtaining supplemental funding. In fact, Budgets for fiscal 76-77 will mandate the acquisition of 8-10% non-ACD funding for each center. To address your other questions:

(a) Due to the uncertainties caused by the recently-enacted Stavisky-Goodman Bill, and possible additional economies demanded by the Emergency Financial Control Board, ACD's own 76-77 Budget is by no means certain. Until ACD has some firm commitment of funds available to it, the Agency cannot extend such a commitment to its centers, desirable as that goal is.

(b) ACD is taking steps to consolidate a number of line items in a center's budget for the coming year. In addition, apart from limiting the types of permissible expenditures of City funds, ACD will not dictate use of alternate funds by individual centers. These policies will substantially increase the latitude of centers in allocating and expending funds.

(c) As noted above, ACD will not only allow, but <u>mandate</u> the acquisition of outside funds by centers. Supplemental funding will be kept by the Day Care Center, and will not cause a reduction in ACD-funding levels to the center. Further, ACD encourages all cost-saving plans consistent with the provision of quality Day Care service, and the maintenance of the center in a licensed status. How-

ever, with regard to filling unutilized spaces with private, fee-paying children, it must be borne in mind that each center must admit every ACD-eligible child who applies for service, up to 110% of its budgeted capacity.

Further, due to the geographic location of many ACD-funded centers, many of these centers will have difficulties in identifying fee-paying children.

Nevertheless, ACD intends to seek approval from the State Department of Social Services for the enrollment of a number of private, fee-paying children at centers which will be able to locate such children. Under this proposal, centers would be allowed to retain all fees paid by these children, and these fees would not of themselves reduce the amount of ACD funding to these centers.

One final word on the direct lease question: The present ACD leadership shares your extreme misgivings over the process of their negotiation, and your outrage that their cost is being borne on the backs of children. We are aware of the many investigations of these leases currently underway, offer our wholehearted support to the investigators, and will make all relevant ACD records available to them. We ask your assistance in bringing to bear all the resources at our command toward their renegotiation.

We call your attention to a number of recent actions which the City has taken regarding direct leases. Firstly, the Comptroller's office has begun withholding rents on three direct lease sites which have a history of major violations. These rents will be withheld until such time as the repairs have been made by the landlords. Secondly, meetings have been arranged by ACD with landlords of 17 other direct lease sites. Remedies for outstanding violations will be discussed, and if these remedies are not carried out by the landlords, rents will be withheld. Further, ACD has contracted with Landauer Associates to investigate the circumstances surrounding 15 direct leases, with a view toward possible re-negotiation. Finally, an Interagency panel has been established to attempt to renegotiate all existing direct leases, beginning with the 17 mentioned above. All of these efforts, however, will require long lead times, while the budgetary economies being demanded of ACD must be accomplished by July 1st.

Again, the Agency for Child Development shares your concern for the future of Day Care in New York City. We are pained by the budget reductions that have been forced upon us by the City's fiscal situation. We ask your assistance at the State level in securing for New York City its rightful share of social service dollars. We are hopeful, however, that the points we have enunciated above will re-

assure you that these drastic reductions, difficult as they are for ACD and damaging as they are to Day Care in this City, have been carried out in the most reasonable way possible.

We look forward to talking with you.

Very truly yours,

Betti S. Whaley
Commissioner

Lew Frankfort
Interim Executive Director

AFFIDAVIT OF JAMES NATHANIEL

157

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAMELA SCHNEIDER, et al.,

Plaintiffs,

v.

BETTI S. WHALEY, et al.,

Defendants.

76 Civ. 2715 (GLG)

AFFIDAVIT IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JAMES NATHANIEL being duly sworn, deposes and says.

1. I am the Director of Field Operations for the Agency for Child Development (ACD), a division within the Human Resources Administration (HRA) of the City of New York.

2. As Director of Field Operations I am in charge of the seven (7) field offices operated by ACD which co-ordinate all of the activities of each day care center in the City of New York. I am responsible for co-ordinating the dissemination of each and every policy or procedural decision affecting day care or ACD funded day care centers to the field offices under my control who in turn communicate to each individaul center.

3. With respect to the scheduled defunding of 49 day care centers on June 30, 1976, I can assert that 75% to 85% of the children who are currently in centers which will be defunded will be or have been offered a placement in another day care center within 15 to 20 blocks from their present placement.

4. With respect to the remaining children, ACD will utilize other alternatives such as family day care programs to attempt placement for these children within the 15-20 block radius. It is estimated that in only a very few instances concentrated in certain geographic areas which have a limited number of day care centers will children be placed beyond the 20 block radius.

5. I have attached hereto the sole copies immediately available to my office of letters sent to parents of children who are presently in attendance at defunded day care centers. This will establish our continuing efforts at securing adequate placements for every child who will be dislocated due to the defundings. These letters are needed by my office once the Court has reviewed them. Copies will be prepared and sent to counsel for the plaintiffs and filed with the Court at a later date.

JAMES NATHANIEL

Sworn to before me this
28th day of June, 1976

Joseph F. Bruno
Notary Public
Reg No. 5497591
Term Expires 3/30/78
Qual. in Kings County

AFFIDAVIT OF ROSEMARY CARROLL

159

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PAMELA SCHNEIDER, et. al.,

Plaintiffs,

v.

BETTI S. WHALEY, et. al.,

Defendants.

----------x

76 CIV. 2715 (GLG)

AFFIDAVIT IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS

STATE OF NEW YORK)
CITY OF NEW YORK) ss. :
COUNTY OF NEW YORK)

ROSEMARY CARROLL, being duly sworn, deposes and says:

1. I am an attorney in the office of W. Bernard Richland, Corporation Counsel, City of New York attorney for the city defendant in this case and am one of the attorneys assigned to the handling of this matter.

2. On June 25, 1976 at approximately 10:30 A.M. I appeared in the United States District Court for the Southern District of New York representing the city defendant Agency for Child Development and all other city defendants and argued on their behalf.

3. During argument and during conferences with the court on that date, all parties through their attorneys were asked by the court to attempt a meeting between themselves to resolve the issue of providing some form of meeting for each center with ACD staff personnel and their attorneys representing that agency.

4. In this regard I telephoned Richard Ashe, Esq., one of the attorneys for the plaintiffs, and advised him that Lew Frankfort, Interim Executive Director for the Agency of Child Development and Stephen Tamke, his assistant, would be willing to meet with plaintiffs' attorney pursuant to the court suggestion to discuss any meetings between ACD staff and the boards of any of the proposed defunded centers which would request such meeting. Further I advised Mr. Ashe that at the attorneys meeting the reasons for defunding of any center could be discussed and the facts of implementation for the criteria issued in selecting each center could also be discussed.

5. Mr. Ashe advised me that he would have to discuss our conversation with his clients before making any decision and that he would contact me on Monday, June 28, 1976 if a meeting was decided. It is now 4:30 P.M. on Monday, June 28th and no call has come into my office from Mr. Ashe or any of the other plaintiffs attorney.

WHEREFORE defendants respectfully request an order denying the plaintiffs' application for a preliminary injunction and dismissing the complaint and for such other and further relief as to this Court may seem just and proper.

Rosemary Carroll

Sworn to before me this
28th day of June, 1976

REPLY AFFIDAVIT OF JACK T. LITMAN

161

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United States District Court
Southern District of New York

- - - - - - - - - - - - - - - - - - X
:
Pamela Schneider, et al.,
:
Plaintiffs,
:
-against-
:
Betti S. Whaley, et al.,
:
Defendants.
:
- - - - - - - - - - - - - - - - - - X

76 Civ. 2715 (GLG)

Reply Affidavit

State of New York)
)ss.:
County of New York)

Jack T. Litman, being duly sworn, deposes and says:

I am a member of the bar of this Court and of the firm of Litman, Friedman & Kaufman co-counsel for plaintiffs herein. I make this affidavit in reply to the affidavit of Stephen Tamke and in support of plaintiffs' motion for a preliminary injunction and class action certification.

Defendants admit or do not deny the essential elements of plaintiffs' claims:

1] Plaintiffs attend federally funded day care centers scheduled for "defunding" by defendants on July 1, 1976;

2] Defendants will be unable to offer alternative day care services for all members of the class by July 1, 1976 (see Tamke affidavit, para. 18); either no alternatives or inadequate alternatives have been offered to the individual plaintiffs;

3] Those few individuals who have been offered day care services will have those services drastically "reduced" (affidavit of Mabel Dean, dated June 19, 1976).

4] Federal and state statutes and regulations require a "fair hearing" prior to discontinuance, termination, suspension or reduction of day care services;

5] With respect to the specific closings at issue at bar, the United States Government has taken the position that plaintiffs are entitled to fair hearings;

6] Plaintiffs have made timely requests for fair hearings;

7] Fair hearings have been denied;

8] Plaintiffs will suffer irreparable harm if their day care centers are defunded.

Response to
"budget crisis"
argument

Defendants contend, without benefit of citation, that because they are required to reduce their budget, the parents of children whose day care services are being terminated have no rights whatever to any input into the decision to deny them -- as opposed to some other parents -- federally funded day care.

This contention has been expressly rejected by the Department of Health, Education and Welfare, by the State Department of Social Services and even by A.C.D. itself.

1. H. E. W.: Already annexed to our moving papers is the written opinion of H.E.W. that all parents whose day care services are being "terminated" or "reduced" or "suspended" or "discontinued" have an "unqualified right" to a fair hearing. This opinion deals not merely in the abstract, but specifically with respect to "day care centers whose funding is scheduled to be terminated as of July 1, 1976 by the New York City Agency for Child Development".

2. New York State Department of Social Services: On June 9, 1976, the defendant New York State Department of Social Services issued an "Administrative Letter" to all local commissioners of social services (including defendant Whaley) setting forth instructions to local departments "which decide that they must because of fiscal pressures, curtail the services which they

have included in their Title XX local plan..." [emphasis added] (Exhibit A hereto). This Administrative Letter expressly provides inter alia that written notice of "a right to a fair hearing" must be given to all individuals for whom "eligibility for a service has ceased because...provision of the service has been terminated". (see Para. V, p.4).

At bar, defendants have not even attempted to comply with this Administrative Letter.

3. A.C.D.: The only two cases cited by A.C.D. in support of its position are Our Children's, Inc. v. Whaley and Windham v. Whaley. In both cases, the day care center were allegedly being defunded for budgetary reasons. Yet, in neither case did defendants claim (as they do now) that the fair hearing regulations were (for that reason) inapplicable. Instead, they argued solely that no hearing was necessary because the plaintiffs had been transferred elsewhere.

For example, in an affidavit (Exhibit B hereto) in Our Children's by Patricia Douglas, Ms. Whaley's administrative assistant, defendants admited that:

> "While it is true that a recipient of day care benefits has a right to a fair hearing to challenge an administrative decision to discontinue, suspend or reduce services, it is clear that no such claim has or can be presented with respect to the children's serviced by Our Children's Day Care Center. Each child who received day care services at Our Children's Day Care Center will continue to receive those services at an alternative site."

Similarly, in Windham, defendant Whaley submitted an affidavit (Exhibit C hereto) stating:

> "Under federal regulations, a recipient of day care benefits, but not the funded agency has a right to a fair hearing to challenge an administrative decision to discontinue, suspend or reduce services. However, the recipient of day care services does not have a right to receive services at a particular facility." (emphasis added).

As to defendants' claim that plaintiffs' services have not been "terminated"

Defendants next claim that no hearing is required because plaintiffs' day care services have not actually been "terminated". This argument is both factually and legally erroneous.

1. the law: As shown in our memorandum of law (pp. 18-21), plaintiffs' right to a fair hearing arose upon "reduction" or "suspension" or "discontinuance" of their day care services. A hearing is required in each of those instances in addition to where A.C.D. "terminates" services. Plaintiffs' moving papers alaready contain voluminous proof of such a reduction or suspension or discontinuance of services.

2. the facts: In any event, the simple fact is that A.C.D. has terminated services of a large number of the plaintiff class. Plaintiffs have attempted to make as detailed a study as possible of those involved, and find that almost three quarters of the class have not received any alternate placement and thus will be terminated on July 1, 1976.

Significantly the Tamke opposing affidavit submitted by defendants contains no specific contrary statement or identification of either the number or identity of class members whose children will allegedly be placed elsewhere by A.C.D. All defen-

dants say there is that 72% of the displaced children allegedly "will be" offered alternate services by July 1. This inchoate hope is obviously wishful thinking at best, since it is already June 28 and nothing like that has even been tried, much less accomplished by A.C.D. In any event, even if defendants' figures were correct, they amount to a concession that 28% (or approximately 1,000 children) will not be placed July 1, 1976. (see Exhibit D hereto).

Even as to the "alternative" placement alleged by A.C.D., plaintiffs have a right to a fair hearing. Annexed hereto is the affidavit of Sonia Aguila which shows that A.C.D. has been making alternative places for children at the defunded centers by forcing non-defunded centers to drop children enrolled at those centers. Such action will, of course, only increase the number of persons entitled to contest "termination" or "reduction" of day care services at a fair hearing.

As to defendants' claim that a hearing will serve no useful purpose

Defendants finally claim that no purpose would be served by a fair hearing because "there are no facts [relied upon by A.C.D.] which are susceptible to challenge, explanation or arguing" (Br. p. 15). This contention is plainly without merit.

Defendants' own exhibits (attached to the Tamke affidavit) show that what is at issue here is not a "system wide" reduction in day care, or the enactment of some state legislative policy, but rather, a series of arbitrary cancellations of specific day care centers, allegedly "for cause" (e.g., under-utilization, high per capita costs, deteriorating facility). Thus the Tamke affidavit admits that the defunded centers were selected because they failed to measure up to certain criteria (see paras. 11(3), 12, 13 and Exhibits I, D and C-1). Defendants themselves elsewhere concede, "an allegation of this sort is precisely the type allegation for which a fair hearing is intended." (Br. p. 17).

Plaintiffs are not seeking to challenge the only "system-wise" or "policy" decision which was made by any governmental body, i.e., the decision to reduce the total number of dollars available for day care. Rather, plaintiffs have a right to be heard as to the necessity and feasibility of the plan adopted by A.C.D. and a further right to challenge the arbitrary and capricious determinations by A.C.D. that the centers attended by their children

are less worthy of continued funding than other centers. That is the precise purpose for having hearings, as the regulations make clear.

In the case at bar, plaintiffs most certainly will dispute the application of these criteria to the defunded centers. Merely by way of example; defendants claim that Chelsea Children's Center is being defunded because it has a $91 per capita/per week cost, well in excess of the $65 optimimum. As the accompanying affidavit of plaintiff Pamela Schneider shows, the actual figure at Chelsea is $63 per week. Thus, A.C.D. has committed a factual error of some 50%. This is precisely the kind of issue which a fair hearing is intended to resolve. (It should be noted that two of the centers attended by children of named plaintiffs -- Beachbrook Nursery School [plaintiff Jane Roe] and Seton Day Care Center [plaintiff Lynn Ann Tyler] are not even listed on defendants' Exhibit C-1 which purports to show the reasons for defunding. Apparently A.C.D. has simply forgotten about these centers).

Conclusion

This case involves federally funded day care centers. It is therefore governed by federal law, and the interpretation of H.E.W. is entitled to controlling weight. The reasons given by defendants for ignoring the law are factually and legally erroneous. This case involves precisely the type of situation which hearings are designed to prevent: namely, arbitrary unilateral reduction of essential services by a local administrative agency.

Jack T. Litman

Sworn to before me this
28th day of June, 1976.

Neil D. Thompson

NEIL D. THOMPSON
Notary Public, State of New York
No. 31-0325840
Qualified in New York County
Commission Expires March 30, 197 8

EXHIBIT A - ADMINISTRATIVE LETTER

DEPARTMENT OF SOCIAL SERVICES

1450 WESTERN AVENUE
ALBANY, NEW YORK 12243

JUN 15 1976

171

ADMINISTRATIVE LETTER

TRANSMITTAL NO.: 76 ADM-56

TO: Commissioners of Social Services

DATE: June 9, 1976

SUBJECT: Directions for Reductions in Spending on Social Services During the Title XX Plan Year

SUGGESTED DISTRIBUTION: Commissioners of Social Services

I. PURPOSE

This Administrative Letter provides interim instructions for local departments of social services which decide that they must, because of fiscal pressures, curtail the services which they have included in their current Title XX local plan (component) by either (a) complete termination of particular services or (b) any reduction in eligibility levels for particular services. As soon as further guidance is received from the Federal government on this issue, the Department will issue final instructions.

For further information contact Richard E. Hegner, Assistant Commissioner, Division of Services, at 800-342-3710, Extension 76287.

II. BACKGROUND

A number of local departments of social services have found that current fiscal pressures are causing them to exhaust their allotments of Federal and State funds under Title XX at a more rapid rate than has been the case in past years.

While this Department has been sensitive to the need for instructions to local departments on the prerequisites for limiting services spending, the Department has also recognized the need to wait for clearer guidance from the Federal government on this issue to avoid confusion.

However, in light of Federal delay in providing such guidance and the increasingly urgent fiscal situations of the local departments, this Department has decided that it is now best to issue interim instructions to the local departments on the circumstances under which they can curtail expenditures for services by either reducing eligibility levels or completely terminating certain services. Final instructions will be issued upon receipt of clear Federal guidelines.

FILING REFERENCES

Previous ADMs INFs	Dept. Regs.	Social Services Law and Other Legal References	Bulletin/Chapter Reference	Miscellaneous References
75 ADM-130 76 ADM-14 76 ADM-37		Sections 20 and 34 of SSL		

EXHIBIT "A"

172

V. NOTICE TO SERVICES RECIPIENTS

Once a local department has received the written approval of this Department to curtail its provision of particular services and followed the instructions for a local plan amendment explained above, the local department must provide written notice to all those whose eligibility for a service has ceased because either (a) eligibility levels for that service contained in the local plan have been reduced in any way or (b) provision of the service has been terminated. The written notice must include the reason for termination of eligibility and information concerning the service recipient's right to a fair hearing upon termination of eligibility.

In a forthcoming Administrative Letter, the Department will provide local departments with a standardized notice of termination of services.

Martha S. Lewis

Martha S. Lewis, Deputy Commissioner
Division of Services

EXHIBIT B -
AFFIDAVIT OF PATRICIA DOUGLASS

174

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------x

OUR CHILDREN'S DAY CARE CENTER, and BOBBIE SUETTING, as Chairman of the Board of Directors and a duly designated trustee of OUR CHILDREN'S DAY CARE CENTER,

Petitioners,

-against-

BETTI WHALEY as Commissioner of the Agency for Child Development and the AGENCY FOR CHILD DEVELOPMENT,

Respondents,

Pursuant to Article 78 of the Civil Practice Law and Rules

AFFIDAVIT

Index No. 250-76

----------x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Patricia Douglass, being duly sworn, deposes and says: 1. I am the Executive Assistant to the Commissioner of the Agency for Child Development (ACD) of the Human Resources Administration (HRA) of the City of New York and being fully familiar with the pertinent facts submit this affidavit in support of respondents' cross-motion to dismiss the petition herein.

2. On or about November 1, 1975, ACD was notified that due to New York City's fiscal crisis, its budget would be cut by 329 million dollars. To comply with these mandated cutbacks extensive dis-

EXHIBIT "B"

cussion and evaluation of the entire ACD program, were had which resulted in the determination that funding for 28 day care programs would be affected as of December 31, 1975. Because the day program at Our Children's Day Care Center provides services for children whose parents attend New York City Community College, the termination date was extended to January 21, 1976, the last day of the Fall semester.

3. Our Children's Day Care Center was notified by a letter dated November 24, 1975 of the applicable procedures for the transfer of services to other day care facilities.

4. The determination to terminate funding for Our Children's Day Care Center involved consideration of several factors. Principally, utilization figures warranted termination of the program. Although the program had been funded at 100% of anticipated use, in fact it was utilized to only 69% of capacity. A 30% underutilization rate can not be justified in the present fiscal situation.

5. Additionally the fixed costs for maintaining the program including salaries could not be reduced to a level which would correlate with usage. Because these fixed costs could not be brought into line with utilization, it was determined that the program should be discontinued.

6. Finally, the determination to terminate funding relied in part upon the availability of similar services, convenient for the parents involved.

BEST COPY AVAILABLE

Since there are alternative placement sites in both the area where the parents live and in the vicinity of Our Children's Day Care Center, ACD was satisfied that equivalent services would be provided at other sites.

7. There is clearly no statutory obligation to fund a particular day care program. Nor is there any federal or state statutory requirement mandating a fair hearing for programs whose funding is terminated. Funding determinations are within the sole discretion of ACD.

8. While it is true that a recipient of day care benefits has a right to a fair hearing to challenge an administrative decision to discontinue, suspend or reduce services, it is clear that no such claim has or can be presented with respect to the children's serviced by Our Children's Day Care Center. Each child who received day care services at Our Children's Day Care Center will continue to receive those services at an alternative site. It is clear that the recipient of day care services does not have a right to receive such services at any particular facility. Accordingly, there is no basis for petitioner's claim of an entitlement to fair hearing herein.

9. Subsequent to the determination to terminate the funding of 28 day care centers, ACD has not undertaken to fund any new programs.

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WHEREFORE, deponent respectfully requests an order denying petitioner's application for relief and dismissing the petition herein.

Patricia Douglass

PATRICIA DOUGLASS

Sworn to before me this
13th day of January, 1976

Ruth H. Vanderjack

Notary Public

Notary Public, State of New York
Qualified in N.Y. County
Comm. Expires 3/30/76
No. 41-5111178

EXHIBIT C - WHALEY AFFIDAVIT IN WINDHAM V. WHALEY

WHALEY AFFIDAVIT 178

IN WINDHAM V. WHALEY

5. By letter dated November 24, 1975, the Center was notified of the applicable procedures for the transfer of services to other day care facilities. (Exhibit B)

6. On or about December 23, 1975, Samuel Windham, Administrative Director of Samuel's Temple Day Care Center, James R. Dumpson, Administrator of HRA and I met, pursuant to Rev. Windham's request, to discuss the basis for ACD's decision to terminate the funding of his program.

7. Rev. Windham was advised that Samuel's Temple Day Care Center's funding was terminated, inter alia, because the facility in which the program is located is unlicenseable and because the cost of necessary repair and renovation of the existing structure is estimated at more than two Hundred fifty thousand ($250,000.00)dollars.

8. Samuel's Temple's funding is derived totally from city tax levy funds. There are notState or Federal funds available because the facility is not licensed.

9. After a futile attempt to enlist the cooperation of Rev. Windham in an orderly transfer of services for the eligible children enrolled in his program, ACD sent a letter to each parent, for whom a record existed, advising the parent of the availability of other programs providing day care services. (Exhibit C)

10. There is no statutory obligation to fund a particular day care program.

11. There is no federal or state statutory requirement nor governing contractual provisions mandating a fair hearing for programs whose funding is terminated. Funding determinations are within the sound discretion of ACD.

12. Under federal regulations a recipient of day care benefits, but not the funded agency has a right to a fair hearing to challenge an administrative decision to discontinue,

EXHIBIT "C"

suspend or reduce services. However, the recipient of day care services does not have a right to receive services at a particular facility.

13. ACD has made no decision to discontinue, suspend or reduce the services to any child who had received services at Samuel's Temple. On the contrary, ACD has offered to transfer children to other facilities. Since there has been no termination of services to recipients, there has been no need to hold fair hearings.

14. Subsequent to the determination to affect the funding of twenty-eight (28) day care centers, ACD has not undertaken to fund any new programs.

WHEREFORE, deponent respectfully requests an order denying Plaintiffs' motion for a temporary restraining order and a preliminary injunction.

Dated: New York, New York
January 5, 1976

Betti S. Whaley
BETTI S. WHALEY

Sworn to before me
January 5, 1976

Kathleen H. Eide

EXHIBIT D - DISPOSITION OF CHILDREN DISPLACED BY CLOSINGS

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Disposition of Children Displaced
by Day Care Center Closings
July 1, 1976

Name of Center	Children Recieving "Alternative" Offers	Children "Terminated" ie. recieving no alternative	Total Number of Children
Mollie Perlbinder	17	42	59
Ours	12	24	36
El Coqui	7	178	185
Melrose reformed	0	40	40
Alianza Civ. Tropical	40	119	159
East Bronx	0	50	50
Mother's Self-Help	8	22	30
Brox Comm. College	0	30	30
SERA	12	21	33
Lorillard Child Cntr.	3	25	28
United Bronx Parents	NA	NA	NA
Red Hook CCC	23	40	63
Colony House	24	36	60
Park Slope CCC	16	16	32
Dr. King Memorial	80	0	80
C.O.N.T.A.C.	32	0	32
Escuela Infatil	22	0	22
Church of God in Christ	16	17	33
Harriet Tubman DCC	0	115	115
Cherub Haven DCC	25	5	30
Ohel Sara	0	55	55
Little People's	20	14	34
First Step	35	112	147
Playgroup	28	2	30
Children of Light	24	6	30
Children's DCC	0	80	80
Puertorriqueños Hispanos	3	42	45

EXHIBIT "D"

Disposition of Children Displaced
by Day Care Center Closings
July 1, 1976 (cont'd.)

Name of Center	Children Recieving "Alternative" Offers	Children "Terminated" ie recieving no alternative	Total Number of Children
Children's Welcome	5	12	17
Children's Underground	24	9	33
Chelsea Children Center	0	32	32
JBG Infant Care	3	19	22
Lower E. Side Lrng. Ctr.	48	77	125
Dis. Rms. for Children	12	18	30
Tafts Tiny Tots	3	34	37
Countee Cullen	25	5	30
Operation Rescue	23	12	35
Mable Lane	0	30	30
City College	0	45	45
St. Paul's	12	22	34
Riverside Infant Care	0	29	29
Citadel of Hope	NA	NA	NA
Allen Community	18	17	35
Jaima & Alberta Wise	125	30	155
Resurrection DCC	40	32	72
Children's Workshop	16	14	30
John D. Marshall FDC	7	24	31
Cinnamon Tree DCC	0	68	68
Beachbrook NS	0	22	22
Richmond Early Lrng. Ctr.	0	51	51
Rochdale Vill. Nursery	0	43	43
Marble Hill NS	0	20	20
Action Nursery	0	14	14
Friendship DCC	0	45	45
Grace Mapes	7	54	61
Seton DCC	0	19	19

Elmendorf	1	33	34
Hegeman	39	117	156
Parents Prep.	4	16	20

ANNEXED AFFIDAVIT OF SONIA AQUILA 183

United States District Court
Southern District of New York
----------x

Pamela Schneider, et al.,

Plaintiffs,

-against-

Betti S. Whaley, et al.,

Defendants.

----------x

State of New York)
: ss.:
County of New York)

Sonia Aguila, being duly sworn, deposes and says:

I am the Director of the Coalition for Human Housing Day Care Center located at 60 Essex Street, New York, New York. The Coalition for Human Housing Day Care Center receives 100% of its funds from the Agency for Child Development through Title XX of the Social Security Act.

The Coalition Day Care Center was not one of those selected for defunding in June of this year. However, my day care center was selected as a "receptacle" center for children in defunded centers on the Lower East Side. Presently, my center is budgeted for a legal capacity of thirty-five children; due to the large numbers of children on the Lower East Side requiring day care, my center has enrolled fourty-one children, and is accordingly 18% overenrolled. (There is also a waiting list of twenty to thirty children.)

Notwithstanding the crowded conditions at our day care

center, last week the Agency for Child Development telephoned me and demanded that I accept two additional children from the Church of All Nations Day Care Center, one of the defunded centers. I was also told during this conversation that it was likely that twenty-three additional children would be assigned to my center, and that I would be required to "eliminate" twenty-three of the children already enrolled in my center

I have discussed this conversation with the directors of a number of day care centers and I believe that this case is not uncommon. As a professional provider of day care for children, I resent this cruel game of shuffleboard that the Agency for Child Development is playing with our children.

Sonia Aguila

Sworn to before me this
25th day of June, 1976.

Notary Public, New York
Qualified in [illegible] County
Commission Expires March 30, 1977

ANNEXED AFFIDAVIT OF
PAMELA SCHNEIDER

185

United States District Court
Southern District of New York
----------x

Pamela Schneider, et al.,

Plaintiffs,

-against-

76 Civ. 2715 [GLG]

Betti S. Whaley, et al.,

Defendants.

----------x

State of New York)
: ss.:
County of New York)

Pamela Schneider, being duly sworn, deposes and says:

I am one of the plaintiffs herein. I make this affidavit in reply to the affidavit of Stephen Tamke and in support of plaintiffs' motion for a preliminary injunction.

Attached to Mr. Tamke's affidavit is an exhibit (C-1) purporting to set forth the "facts" upon which the Agency for Child Development ("A.C.D.") elected to choose Chelsea Children's Center for defunding. It appears that the salient factor allegedly relied upon by A.C.D. in choosing to defund Chelsea Children's Center is that the Center allegedly has a per capita/per week cost of $91.64, well over the optimum level of $65. I have no idea where A.C.D. dreamed up this figure, but it has no relationship to reality. The fact

of the matter is that the per capita/per week cost at Chelsea Children's Center is $63--thus, A.C.D.'s figures are off by nearly 50%.

I am advised that the very purpose of holding fair hearings is to prevent an administrative agency from going off half cocked and criticizing erroneous or made up figures in support of its decisions which could affect the lives of thousands of children.

Pamela Schneider

Sworn to before me this
28th day of June, 1976.

CARL R. MILLER
Notary Public, State of New York
No. 30-4604970
Qualified in Nassau County
Commission Expires March 30, 1977

Carl R Miller

State of New York)
: ss.:
County of New York)

Mabel Dean, being duly sworn, deposes and says:

I have read the foregoing affidavit to Pamela Schneider and she acknowledges to me that it is true.

Mabel Dean

Sworn to before me this
28th day of June, 1976.

Carl R Miller

187

United States District Court
Southern District of New York
----------x

Pamela Schneider, et al.,

Plaintiffs,

-against-

Betti S. Whaley, et al.,

Defendants.

----------x

76 Civ. 2715 [GLG]
Reply
Affidavit

State of New York)
: ss.:
County of New York)

Jack T. Litman, being duly sworn, deposes and says:

I am a member of the bar of this Court, and of the firm of Litman, Friedman & Kaufman, and co-counsel for the plaintiffs herein. I make this affidavit in reply to the affidavit of James Nathaniel and in support of plaintiffs' motion for a preliminary injunction and class action certification.

The affidavit of James Nathaniel of June 28, 1976, once again demonstrates the unsatisfactory efforts the defendants are undertaking with respect to the lives of some 3,500 children:

1] Neither the Nathaniel affidavit, nor the Tamke affidavit before it denied or addressed itself in any way to the failure of defendants to provide any or adequate placement for the individual plaintiffs at bar. Indeed, defendants have now had more than one week since the filing of a lawsuit in which to attempt to place these individual plaintiffs and have been unable to do so--thus, as a minimum, the individual plaintiffs have

demonstrated beyond any doubt that they are entitled to a fair hearing;

2] Neither the Nathaniel affidavit, nor the Tamke affidavit before it states just how many (or even approximately how many) children have already, as of June 28, 1976, received alternative placements--thus, defendants concede that plaintiffs' figure of 28% is accurate; and

3] Neither the Nathaniel affidavit, nor the Tamke affidavit before it even touches on the issue of "reduction" in services for those few children who have been offered alternative placement--defendants apparently concede that the "receptacle" centers are both overcrowded and too far from the children's homes.

Instead of attempting to demonstrate with any degree of specificity the efforts being made to place plaintiffs' children, the results of those efforts, and the method by which placements will be effected in the future, defendants content themselves with the generalized, unsubstantiated, and irresponsible prediction as to the anticipated placement at some unspecified date in the future.

In any event, future intentions--however good--cannot substitute for deeds. If defendants intend to transfer all members of the plaintiff class to adequate alternative centers, then they should have no objection whatever to an injunction staying the closing of the defunded centers until such transfers are complete.

Jack T. Litman

Sworn to before me this
29th day of June, 1976.

Neil D. Thompson

NEIL D. THOMPSON
Notary Public, State of New York
No. 31-9325840
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PAMELA SCHNEIDER, PATRICIA WHITE, MARIE MYRTIL, JANE ROE and LYNN ANN TYLER, on behalf of themselves and their minor children and all others similarly situated,

Plaintiffs,

-against-

BETTI S. WHALEY, Individually and as Commissioner of the Agency for Child Development of the City of New York; J. HENRY SMITH, Individually and as Commissioner of the Human Resources Administration of the City of New York; and PHILIP TOIA, Individually and as Commissioner of the Department of Social Services of the State of New York,

Defendants.

MEMORANDUM DECISION AND ORDER

76 Civ. 2715 (GLG)

----------X

CANNELLA, D.J.:

Named plaintiffs, parents whose children attend day care centers funded under Title XX of the Social Security Act (42 U.S.C. § 1397 et seq.) suing on behalf of themselves and all others similarly situated, seek a preliminary injunction staying the Agency for Child Development ("ACD") and the other defendants from totally defunding forty-nine (49) day care centers and partially defunding fifteen (15) others prior to affording plaintiffs some form of a hearing. The preliminary injunction is granted.

On July 1, 1976, the ACD, a division of the Human Resources Administration created by mayoral order to administer New York City's day care services, will totally defund forty-nine day care programs and partially defund fifteen more. These defundings, which were publicly announced on May 26, 1976, will result in the closing of centers which now provide services for more than 3,000 children.

The day care centers are authorized and operated pursuant to New York Social Service Law § 410 et seq. By enacting § 410-b of the Social Service Law, New York State has exercised its option to participate in the federal program providing funds to electing states. The defundings are the direct result of a cut in ACD's 1976-77 Budget from the 157 million dollars allocated for (fiscal year) 1975-76 to 126.2 million "or a 16% deficit between present cost and available funds." (Tamke Affidavit in Opposition at 2). Reacting to this financial constraint, ACD determined that it was necessary to defund a number of day care centers and undertook a cost-utilization and facility adequacy study in order to determine which centers should be defunded. On the basis of these inquiries and meetings between ACD staff members and the sponsoring boards of a number of the centers selected to be defunded, the decision to defund the programs in which plaintiffs' children are enrolled was made.

Notice of the closings was sent to each affected center on or about June 1, 1976 and meetings were held between the ACD staff and the sponsoring boards of the defunded programs "for the express purpose of explaining the reasons for defunding and the implementation of criteria used in making such determination." (Tamke Affidavit at 3). The record is unclear regarding how many parents have received individual notice that their center is to be closed, however, a survey conducted at plaintiffs' behest by the Leadership Committee of the Day Care Legal Action Coalition revealed that as of the middle of June only 28% of the children attending centers which will close had been offered alternative services. On the other hand, a review of the exhibits submitted by ACD on the evening of June 28th indicates that at present well over 50% of the parents have been notified of the defunding and offered alternative services.

The Leadership Committee survey also disclosed that 1,000 parents had made written demands for a fair hearing pursuant to 18 N.Y.C.R.R. § 358.2 et seq., but that none had been granted. Finally, the survey results indicated that the alternative services which were offered to those 28% who had been contacted were considered inadequate by those parents. The primary complaint voiced was

that the alternative center was not within walking distance as the defunded center had been, and required one or two buses to reach.

ACD projects that by June 30, 1976 72% of the affected children will have been placed in alternative centers, and that by August 31, 1976 all remaining children will be placed. In addition, ACD has pledged that in making the new placements it will "accord geographic considerations the highest priority...." (Tamke Affidavit at 7), and estimates that between 75% and 85% of the children affected will be offered placement in centers within 15 to 20 blocks of their present center. (Nathaniel Affidavit at 1).

Upon the above facts the plaintiffs move for preliminary relief enjoining the defendants from defunding their centers prior to affording them a hearing. They urge that such a hearing is required by the terms of 45 C.F.R. §§205.10 and 228.14 as well as the due process clause of the fourteenth amendment. In order to prevail upon a motion for a preliminary injunction, a party "must either demonstrate a combination of probable success on the merits and the possibility of irreparable injury or, in the alternative, that he has raised serious questions going to the merits and that the balance of hardships

tips 'decidedly' in his favor." Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1121 (2d Cir. 1975).

Before proceeding to a consideration of the merits of plaintiffs' claim, the Court grants their motion to denominate this action a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class, which shall consist of all parents of children who attend the centers scheduled to be defunded on July 1, 1976, is so numerous that joinder of the more than 3,000 class members would be impracticable. In addition, the question of whether a hearing is required is common to all members of the class and the named plaintiffs' claims are typical. The Court finds that the named plaintiffs and their attorneys will adequately represent the interests of the class. Finally, this case is appropriate for treatment as a 23(b)(2) class action in that the defendants have "acted or refused to act on grounds generally applicable to the class ... " making final class wide injunctive relief appropriate.

THE MERITS

A. The Claim

Plaintiffs premise jurisdiction in this action on 28 U.S.C. § 1343(3) and (4), 28 U.S.C. § 1331 and the

doctrine of pendent jurisdiction. While the plaintiffs do not dispute that ACD, the City and the State are all in a "financial crunch" and that ACD's limited funding requires a redistribution of funds at the very least, they claim that by defunding the centers without providing the affected parents a prior hearing and/or public notice period the defendants are acting in violation of the due process clause of the fourteenth amendment as well as in violation of the applicable federal (45 C.F.R. §§ 205.10, 228.14) and state regulations (18 N.Y.C.R.R. § 358). Specifically, the plaintiffs request that prior to a final decision regarding defunding there be a "single [group] hearing at which evidence common to all defunded centers will be presented" or "several simultaneous hearings ... each dealing with parents from a specific center or group of centers." (Plaintiffs' Views re: Fair Hearing at 1-2).

B. The Law

In Hagans v. Lavine, 415 U.S. 528 (1974) the Supreme Court held that where a complaint contains both a federal question claim that a state or local practice is violative of a constitutional provision, and a pendent claim that a state practice is inconsistent with a federal

statute or administrative regulation, the district court should make a threshhold determination as to whether the constitutional challenge is substantial so as to vest the court with a jurisdictional predicate from which consideration of the pendent claim can proceed. Under Hagans, if the pendent or statutory claim is "dispositive" the court is to proceed to consider it and thus avoid a constitutional decision. Id. at 543 and 547 n.12. In the instant case, however, the Court concludes that none of the pendent claims urged by the plaintiffs is dispositive and the Court must, perforce, reach the constitutional issue.

Analysis of the regulations contained in 45 C.F.R. § 205.10 et seq., indicates that under the facts of this case few of the class members would be entitled to a procedure whereby they could effectively make their positions known prior to the scheduled closings. Even if the Court accepts the view expressed by the H.E.W. Associate Regional Commission for Public Services that an offer of alternative services at a distant center is a reduction in services which triggers the right to a hearing, 45 C.F.R. § 205.10(a)(6)(A) provides that if a determination is made at the hearing that the "sole issue is one of State or Federal law or policy ... and not one of incorrect grant computation" assistance can be reduced before a decision is rendered.

The Court concludes that the question of how to meet the current budget crisis is one of policy, albeit policy which cannot be made without access to facts (see discussion infra). As such it comes within the meaning of § 205.10(a)(6)(A) and mandating compliance with the federal regulations will not be dispositive of the plaintiffs' claim for relief. The Court therefore proceeds to a consideration of plaintiffs' constitutional claim.

THE CONSTITUTIONAL QUESTION

The constitutional question raised by this case is whether the parents who utilize the day care centers scheduled to be closed on July 1, 1976 have a due process right to some sort of hearing or opportunity to present evidence and argument, prior to the closings.

Analysis begins with an examination of the nature of the interest which the plaintiffs have in sending their children to day care centers. Pursuant to 42 U.S.C. § 1397a, Congress have provided federal funds to pay for 75% of a state's total expenditures (up to a maximum for New York of approximately 150 million) in providing child care services for the purpose of "achieving or maintaining economic self-support to prevent, reduce or eliminate dependency." (42 U.S.C. § 1397a(a)(1)(A)). New

York State has chosen to participate in this program and pursuant to Social Services Law § 410-b, the state department of taxation and finance is authorized to accept and receive funds from the federal government for the "construction, maintenance or operation of facilities for day care for children, under or pursuant to any federal law heretofore or hereafter enacted...." § 410 permits cities to provide day care at public expense for eligible children and to "purchase" such care from private non-profit corporations. Pursuant to New York City Executive Order No. 38, July 1, 1971, the Agency for Child Development ("ACD") a division of the Human Resources Administration of the City of New York, was created to oversee the City's participation in the provision of day care services. To date, ACD has made day care services available to all members of the class.

In light of the above statutory and regulatory provisions it is evident that the plaintiffs have acquired a specific and legitimate expectation that they will be able to send their children to a day care center. As the Supreme Court said regarding the termination of Home Relief Benefits under Aid to Families with Dependent Children, "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them." Goldberg v. Kelly,

397 U.S. 254, 262 (1970). Such an entitlement rises to the level of a property interest protected by the due process clause of the fourteenth amendment. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972) the Court stated that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Based upon the applicable statutes and regulations it cannot be doubted that the plaintiffs have a property interest in continuing to receive the state-afforded benefit of being able to send their children to day care centers. See Goss v. Lopez, 419 U.S. 565, 572-74 (1974).

The issue in the instant case, however, is whether the impact of the decision to close the selected day care centers upon those parents presently utilizing them adjudicates important rights to which those parents have an entitlement. While it is settled that minimal procedural due process is not required "in every conceivable case of government impairment of private interest," Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961), the Court has noted that it is the nature of the interest impaired rather than its weight which determines whether

the due process clause is applicable. Goss v. Lopez, 419 U.S. at 575. "[A]s long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." Id. at 576. By analogy to the ten-day suspension from school found not to be de minimus in Goss, the Court concludes that depriving a parent of a previously afforded opportunity to utilize a nearby day care center whose staff is familiar with the needs of the child is, similarly, not de minimus and may not be done without regard for the strictures of due process. Although a parent may not have an entitlement to send a child to a particular center, having once begun at a particular center there is a reasonable expectation that the child will be permitted to continue to attend there. Compare N.A.A.C.P. v. United States Postal Services, 398 F.Supp. 562 (N.D. Ga. 1975) (users of post office have no entitlement regarding the continued location of a branch nearby). This problem is especially acute in that the children involved are quite young and readjustment may be difficult. More severe detriments are suffered in situations where children have special emotional or physical problems with which their particular center has been dealing (see, e.g., the affidavits of Marie Myrtil and Jane Roe). Although the

record does not speak to the point, the Court concludes from a reading of the relevant regulations as well as the papers filed in this case, that it is unusual for a child to be shifted from one center to another in the absence of some special circumstance, such as a move by his parents. 18 N.Y.C.R.R. § 459.6(a)(1) provides that no child should be accepted for care unless the director of the center "has determined that admission meets the needs and interests of the child and his family and of the group to which the child will be assigned...." § 459.10(c) requires the center to obtain relevant information regarding the child's background, capabilities and limitations "to assist in the introduction and participation of such child in the program of the day care center." Finally, § 459.15 requires each center to develop "a program for meeting the individual and group needs of the children therein...." Taken together, these regulations indicate that continuity is not only the norm of the system, it is the implied mandate of the regulations. Thus, this situation is surely different from that existing in the Massachusetts prison system where transfer from one prison to the other occurs not infrequently and for numerous reasons or no reason. As a result, the Supreme Court's conclusion that a prisoner's "expectation ... in remaining

at a particular prison so long as he behaves himself, ... is too ephemeral and insubstantial to trigger procedural due process protections...." Meachum v. Fano, 44 U.S.L.W. 5053, 5057 (U.S. June 25, 1976) does not apply to the parents in the instant case.

This conclusion is in accord with that reached by Judge Ward in Gasaway v. McMurray, 356 F.Supp. 1194, 1197 (S.D.N.Y. 1973), where it was held that the claim of a right to a hearing prior to the closing of a day care center and relocation at an already overburdened center raised a not insubstantial constitutional question. Further support is found in two decisions by the Second Circuit Court of Appeals. In Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973), the court held that tenants in municipal housing had a property interest in rent levels and imposition of service charges sufficient to trigger a right to some due process prior to any changes in either. More recently in Caramico v. Secretary of H.U.D., 509 F.2d 694 (2d Cir. 1974), the court considered the nature of the property interest belonging to non-owner occupants of two-to-four family dwellings with mortgages insured by the Federal Housing Administration ("FHA"). In Caramico, the landlords who owned the houses in which the plaintiffs lived had

defaulted on their mortgage payments. The mortgagees, desiring to recover their mortgage insurance from FHA sought to evict the plaintiffs in order to comply with an FHA rule that required the mortgagee of a defaulted property to deliver that property unoccupied before he could recover on the insurance. HUD was authorized to waive the no-occupant requirement and a HUD handbook mentioned certain factors which might be considered in permitting a waiver. In light of these factors, the court found a protectable property interest, stating:

> It is true that plaintiffs here do not have a conventional property interest. They have no privity of contract because their leases are no longer in effect and their status as occupiers has been foreclosed by the state court proceedings. Nevertheless, it is now abundantly clear that there are other protectable interests besides the traditional ones. [Citations omitted.] When, as in this case, plaintiffs have resided in their apartments for a substantial period of time, they have some interest in continued occupancy, at least when that occupancy is not flatly prohibited by regulation.
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> . . . .
>
> Since plaintiffs have a protectable interest in continued occupancy, and are beneficiaries of the very Act under which their eviction is demanded, we agree with Judge Dooling that they have a right not to be subjected to treatment both "covert and arbitrary," and must be allowed to have an input into the decision to require eviction.

Id. at 700-01 (footnotes omitted). Finally, relying upon Burr and Caramico, Judge Zampano has held that tenants in housing have a "protected interest at stake in [a] policy change" which terminated the housing authority's "no eviction" policy and replaced it with a policy requiring payment of rent in arrears. Owens v. Housing Authority, 394 F.Supp. 1267, 1272 (D. Conn. 1975). Thus, on the instant factual record and in the context of massive defundings, this Court (on the authority of the above discussed cases) declines to follow the decision in Windham v. City of New York, 405 F.Supp. 872 (S.D.N.Y. 1976).

Having determined that the plaintiffs have an entitlement to the use of a day care center as accessible as the one in which their children are presently enrolled and to which these young children have become acclimated, the question becomes, what process is due?

The defendants contend that the decision to close the subject day care centers is one of policy reached after a consideration of legislative facts and that there are no facts bearing on this question which a hearing would bring to light. This reasoning fails to recognize that the due process clause also applies to administrative policy decisions when those decisions are premised upon adjudicative facts. Although the distinction between

adjudicative and legislative facts is easier to state than to apply, as Professor Davis explains, adjudicative facts are "facts about the parties and their activities, business and properties," while legislative facts are "general facts which help the tribunal decide questions of law and policy and discretion." K. Davis, Administrative Law Treatise § 7.02 at 413 (1958). In discussing this distinction, Judge Friendly stated,

> [n]ormally, when a civilian executive or administrative agency is about to take action adverse to a citizen, on the basis of "adjudicative facts," due process entitles the citizen at some stage to have notice, to be informed of the facts on which the agency relies, and to have an opportunity to rebut them....

Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971). In the instant case the facts upon which ACD made its defunding decision and the facts which the plaintiffs seek to present are facts relating to the business, activity and property of the day care centers scheduled to be closed. The facts upon which the ACD relied in making its decision regarding which centers to close are facts which are both adjudicative and within the knowledge of the plaintiffs. As the Tamke affidavit details, in addition to fiscal criteria, the ACD considered "facility quality", "avail-

ability of alternatives" and "program quality." (Affidavit at 4). These are all adjudicative type facts about which plaintiffs are peculiarly situated to comment and about which they should be given an opportunity to comment. As the Court said in Caramico, 509 F.2d at 701,

> This input can be of value to the federal defendants as well as to the plaintiffs. For example, plaintiffs may be able to show that the housing they occupy is fit for continued habitation and that the repairs required in order to make it salable do not require the property to be vacated. Or they may be able to show to the satisfactions of the federal defendants that the threat of vandalism if the apartments are vacated is high and that continued occupancy is necessary for preservation of the property.
>
> It is essential to the protection of plaintiffs' rights that they be allowed to participate because neither the FHA nor the mortgagees seem to be able to represent the interests of occupants. The mortgagees are often far removed from the actual property and therefore have no information that could aid the FHA in determining whether vacant delivery is necessary. The FHA has already proved itself incapable of adequately investigating each request. Only plaintiffs, and others in their position, have both the motive and information to insure that a reasoned decision, taking their interest into account, will be made.

Based on the above, the court held that the tenants should be afforded notice, an explanation of the grounds for the decision and an opportunity to submit evidence and argument regarding the decision to be made. Similarly, in Burr

v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973), the court held that before a municipal housing authority could impose across-the-board rent increases, all tenants had to be afforded notice of the proposed increase and an opportunity "to submit any material they consider relevant to disprove the need for the rent increase." Id. at 1170.

In the instant case the Court finds that the parents have information and ideas which should be considered by ACD before it makes a decision and that due process requires that the plaintiffs be afforded some kind of input (cf. Friendly,

Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975)) before a final decision is made. *

In conclusion, the Court finds that the plaintiffs have demonstrated a substantial likelihood that they will succeed on the merits. As to the balance of hardships, although the Court does not minimize the nature and extent of the fiscal crisis facing the defendants, it does not justify taking action in violation of the due process clause. The relief granted to the plaintiffs in the case will not put an undue financial burden upon the defendants. It will, of course, require them to keep funding the centers until a hearing is held and the information gathered there is evaluated. How long this takes is a function of how quickly the defendants act. The

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* The defendants have referred the Court to the recent decision of Mathews v. Eldrige, 44 U.S.L.W. 4224 (U.S. Feb. 24, 1976), apparently contending that due process does not require the hearing be held before the centers are defunded. This, of course, is not the import of Mathews. As Justice Powell there stated, the "Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest." Id. at 4228 (emphasis supplied). Here, unlike the situation in Mathews, there is no opportunity for an administrative review of ACD's decision. It is a final decision. As a result, due process requires that the hearing be afforded before the defunding rather than after, when it would be no more than a sham.

entire process can easily be concluded within one month and, in all likelihood, will require two to three weeks. Balanced against the expenditure which such continued funding will require is the right of the plaintiffs to have an input into this decision before they feel its impact. A final consideration is the fact that numerous members of the plaintiff class have been demanding a hearing over the last few weeks and the defendants could have utilized their own regulations (18 N.Y.C.R.R. § 358.6) to hold a group hearing similar to what the Court is now ordering. Having chosen to proceed without providing such a hearing, the Court finds the balance of the equities to be in favor of the plaintiffs.

It is therefore ordered that ACD hold a group hearing or a series of group hearings as soon as is practicable. The purpose of this hearing or group of hearings is to afford the parents an opportunity to present their views and information to ACD. The Court will not order ACD to present any evidence or produce its officials for questioning. Its decision, and the basis therefore, is amply laid out in the papers submitted to this Court.

The parties are directed to submit proposed orders by July 1, 1976 at 12:00 noon.

The foregoing constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

The Court declines to issue a stay pending appeal.

SO ORDERED.

John M. Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
June 30, 1976.

FINAL ORDER - 240

DISTRICT COURT ORDER, CANNELLA, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

PAMELA SCHNEIDER, et al., :

Plaintiffs, :

-against- :

BETTI S. WHALEY, et al., :

Defendants. :

- X

ORDER

76 Civ. 2715 (GLG)

Plaintiffs having moved by Order to Show Cause dated June 21, 1976, on behalf of themselves, their minor children and all others similarly situated for an order pursuant to Rule 65 Fed.R.Civ.P. preliminarily enjoining defendants from withholding or reducing funding of day care centers attended by children of the plaintiff class, pending administrative hearings thereon, and for an order pursuant to Rule 23(b)(2) Fed.R.Civ.P. declaring that this action proceed as a class action; and the Court having heard oral argument on June 25, 1976 and having received written evidence on June 25, 1976, June 28, 1976 and June 29, 1976, and having granted all parties an opportunity to call witnesses at the hearing on June 25, 1976, and the Court, after due deliberation having rendered and filed its written Memorandum Decision and Order, dated June 30, 1976, and upon rehearing held this day,

IT IS ORDERED, as follows:

1. plaintiffs' motion pursuant to Rule 23, Fed.R.Civ.P. is granted; and this action is certified as

a class action under Rule 23(b)(2), Fed.R.Civ.P., on behalf of all parents of children who attended as of May 26, 1976, day care centers scheduled to have their funding discontinued in whole or in part by defendants on July 1, 1976 ("the defunded centers") and all provisions of this order shall inure to the benefit of all members of the plaintiff class;

2. plaintiffs' motion pursuant to Rule 65 Fed.R.Civ.P. is granted;

3. that defendants are enjoined from defunding the subject day-care programs prior to holding a group hearing or a series of group hearings, as soon as practicable, for the purpose of affording plaintiffs' parents an opportunity to present their views and information to the Agency for Child Development ("ACD") and that attorneys for plaintiffs may submit said views and information on behalf of plaintiff class;

4. that the group hearing will be held on five (5) calendar days' notice to be given to the subject day-care programs to be distributed by them to plaintiff parents; that the said notice of group hearing shall apprise plaintiff parents that information relating to the business, activity, property of the subject day care centers and any ideas which plaintiff parents wish to have considered by ACD may be presented at said group hearing; and

5. ACD shall submit to plaintiffs and personally serve on their attorneys its written decision after the hearings articulating the facts underlying and the reasons for its decision after the hearings at least two (2) business days prior to effectuating such decisions.

It is SO ORDERED.

JOHN M. CANNELLA,
United States District Judge

Dated: New York, N.Y.
July 1, 1976.

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NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

PAMELA SCHNEIDER, et al.,

Plaintiffs,

-against-

BETTI S. WHALEY, et al.,

Defendants.

----------x

NOTICE OF APPEAL

76 Civ. 2715 (GLG)

S I R S :

NOTICE is hereby given that the defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order of Hon. John M. Canella entered herein on or about July 1, 1976 which enjoined the defendants from defunding certain day-care programs and this appeal is taken from each and every part of said order as well as from the whole thereof.

Dated: New York, N.Y.
July 2, 1976

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York
Attorney for Defendants
Office & P.O. Address:
Municipal Building
New York, N.Y. 10007

By _____
CARL SANDERS

TO:
LITMAN, FRIEDMAN & KAUFMAN
120 Broadway
New York, N.Y. 10005

POLLACK & KAMINSKY
61 Broadway
New York, N.Y. 10006

BEST COPY AVAILABLE

STATE OF NEW YORK :

SS:

COUNTY OF ~~NEW~~ YORK: —

Bruce Barnes

being duly sworn, says that on the 9 day of July 19 76

at No. 120 B'way in the Borough of Manhattan in NEW YORK CITY, he served a copy of the annexed Grant appendix upon Freedman, Sutton Esq.

the Attorney for the Rhinelander, Appellants in the within entitled action,

by delivering a copy of the same to a person in charge of said Attorney's office,

and leaving the same with him.

JAMES BURNS
Commissioner of Deeds
City of New York - No. 4-1787
Commission Expires March 1, 1978

Sworn to before me this 9

day of July 19 76

Bruce Barnes

James Burns